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**REPORTS**  
**OF**  
**CASES DECIDED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF INDIANA**

**WITH TABLES OF CASES REPORTED AND CITED, TEXT  
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN  
INDEX, AND NOTES TO THE REPORTED CASES**

---

**WILL H. ADAMS,**  
**OFFICIAL REPORTER**

**WILBUR G. CARPENTER,**  
**CONNOR D. ROSS,**  
**LUCY H. WILHELM,**  
**ASSISTANTS**

**VOL. 188**

**CONTAINING CASES DECIDED IN THE NOVEMBER TERM, 1918, AND  
IN THE MAY AND NOVEMBER TERMS, 1919**

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# CASES REPORTED

## A

|                              |     |
|------------------------------|-----|
| Advisory Board, etc. v.      |     |
| State, ex rel.....           | 331 |
| Aetna Trust, etc., Co. v.    |     |
| Nackenhorst, Rec. ....       | 621 |
| Arbuckle v. State.....       | 444 |
| Arnold v. State, ex rel..... | 222 |

## B

|                            |     |
|----------------------------|-----|
| Banks v. State.....        | 353 |
| Barker v. State.....       | 263 |
| — v. —.....                | 493 |
| Bass v. State.....         | 21  |
| Bear, Lawler v. ....       | 308 |
| Bennett v. State.....      | 380 |
| Berry v. State.....        | 102 |
| Berry, Admr., Union Trac-  |     |
| tion Co. v.....            | 514 |
| Bleiweiss v. State.....    | 184 |
| Blomberg v. State.....     | 619 |
| Bridenbaugh, Cromer v....  | 393 |
| Brown, Sourbier v.....     | 554 |
| Brumfiel, State v.....     | 584 |
| Bryan v. Mayo.....         | 548 |
| —, City of Indianapolis v. | 586 |

## C

|                                |     |
|--------------------------------|-----|
| Caldwell, Felker v.....        | 364 |
| Carson, Tolleston Club, etc.   |     |
| v.....                         | 642 |
| Chicago, etc., R. Co., Hill v. | 130 |
| —, Mishler v.....              | 189 |
| — v. Public Service Com-       |     |
| mission.....                   | 334 |
| Christensen, Indiana Pipe      |     |
| Line Co. v.....                | 400 |
| Cincinnati, etc., R. Co. v.    |     |
| Cleveland, etc., R. Co.....    | 230 |
| Citizens' Bank, etc. v. Op-    |     |
| perman.....                    | 212 |
| City of Indianapolis v.        |     |
| Bryan.....                     | 586 |
| —, State, ex rel. v.....       | 685 |
| Cleveland, etc., R. Co., Cin-  |     |
| cinnati, etc., R. Co. v.....   | 230 |
| —, Public Service Com-         |     |
| mission v. ....                | 197 |
| Clevenger v. State.....        | 592 |
| Clift v. Southern R. Co.....   | 472 |

|                            |     |
|----------------------------|-----|
| Colondro v. State.....     | 533 |
| Cromer v. Bridenbaugh....  | 393 |
| Crouch & Son v. Parker.... | 660 |

## D

|                        |     |
|------------------------|-----|
| Dillon v. State.....   | 603 |
| Dunville v. State..... | 373 |

## F

|                             |     |
|-----------------------------|-----|
| Fauvre Coal Co. v. Kushner. | 314 |
| Felker v. Caldwell.....     | 364 |
| Flinn v. State.....         | 531 |
| Frazer, Public Service Com- |     |
| mission v. ....             | 573 |

## G

|                                 |     |
|---------------------------------|-----|
| Gallivan, Pittsburgh, etc., R.  |     |
| Co. v.....                      | 722 |
| Gammon, Phillips v.....         | 497 |
| Geo. Kraft Co. v. Heller....    | 612 |
| Goodman v. State.....           | 70  |
| Green, Exr., Nation v.....      | 697 |
| Griffith, Judge, State, ex rel. |     |
| v.....                          | 167 |

## H

|                                |     |
|--------------------------------|-----|
| Hammond, Luckett v.....        | 484 |
| Heier v. State.....            | 172 |
| Heller, Geo. Kraft Co. v....   | 612 |
| Hill v. Chicago, etc., R. Co.. | 130 |
| Hinshaw v. State.....          | 147 |
| — v. —.....                    | 447 |
| Horning v. McGill.....         | 332 |
| House, Wright v.....           | 247 |

## I

|                             |     |
|-----------------------------|-----|
| Indiana Pipe Line Co. v.    |     |
| Christensen.....            | 400 |
| Indiana State Board of Fi-  |     |
| nance v. State, ex rel..... | 36  |
| Indianapolis Telephone Co.  |     |
| v. State.....               | 724 |

## J

|                              |     |
|------------------------------|-----|
| Jackson, Rec., v. Rutledge.. | 415 |
| James v. State.....          | 579 |
| Jenkins v. State.....        | 510 |



## K

|                                             |     |
|---------------------------------------------|-----|
| Kilgore v. Templer .....                    | 875 |
| Koehler v. State .....                      | 387 |
| Kruger, Pittsburgh, etc., R.<br>Co. v. .... | 723 |
| Kushner, Fauvre Coal Co. v.                 | 314 |
| Kyle, Steenburg v. ....                     | 26  |

## L

|                                                |     |
|------------------------------------------------|-----|
| Lake Erie, etc., R. Co. v. Mc-<br>Farren ..... | 113 |
| Latshaw, Prather v. ....                       | 204 |
| Lawler v. Bear .....                           | 308 |
| Lilly, Martin v. ....                          | 139 |
| Luckett v. Hammond .....                       | 484 |

## M

|                                              |     |
|----------------------------------------------|-----|
| McFarren, Lake Erie, etc.,<br>R. Co. v. .... | 113 |
| McGill, Horning v. ....                      | 332 |
| McNeill, Rochester Bridge<br>Co. v. ....     | 432 |
| Marco v. State .....                         | 540 |
| Martin v. Lilly .....                        | 139 |
| Mayo, Bryan v. ....                          | 548 |
| Metzker, Whitesell v. ....                   | 1   |
| Mishler v. Chicago, etc., R.<br>Co. ....     | 189 |
| Moore v. Ryan .....                          | 345 |

## N

|                                                      |     |
|------------------------------------------------------|-----|
| Nackenhorst, Rec., Aetna<br>Trust, etc., Co. v. .... | 621 |
| Nation v. Green, Exr. ....                           | 697 |

## O

|                                            |     |
|--------------------------------------------|-----|
| O'Daniel v. State .....                    | 477 |
| Oilar v. Oilar .....                       | 125 |
| Opperman, Citizens' Bank,<br>etc., v. .... | 212 |

## P

|                                               |     |
|-----------------------------------------------|-----|
| Parker, Crouch & Son v. ....                  | 660 |
| Phillips v. Gammon .....                      | 497 |
| Pierson v. State .....                        | 239 |
| Pittsburgh, etc., R. Co. v.<br>Gallivan ..... | 722 |
| — v. Kruger .....                             | 723 |
| Poer, Trustee, v. State, ex<br>rel. ....      | 55  |
| Prather v. Latshaw .....                      | 204 |
| Prudential Ins. Co. v.<br>Ritchey .....       | 157 |

|                                                            |     |
|------------------------------------------------------------|-----|
| Public Service Commission<br>v. Chicago, etc., R. Co. .... | 334 |
| — v. Cleveland, etc., R.<br>Co. ....                       | 197 |
| — v. Frazee .....                                          | 573 |

## R

|                                            |     |
|--------------------------------------------|-----|
| Ritchey, Prudential Ins. Co.<br>v. ....    | 157 |
| Roberts v. State .....                     | 713 |
| Robinson v. State .....                    | 467 |
| Rochester Bridge Co. v. Mc-<br>Neill ..... | 432 |
| —, Travis, Admx., v. ....                  | 79  |
| Rutledge, Jackson, Rec., v. ....           | 415 |
| Ryan, Moore v. ....                        | 345 |

## S

|                                           |     |
|-------------------------------------------|-----|
| Sarlin, State v. ....                     | 359 |
| Scherer v. State .....                    | 14  |
| Schnull, Vandalia R. Co. v. ....          | 87  |
| Schulmeyer v. State .....                 | 463 |
| Sell, Trustee, v. State, ex<br>rel. ....  | 671 |
| Sharp v. State .....                      | 276 |
| Sisk v. State, ex rel. ....               | 328 |
| Smith v. State .....                      | 64  |
| — v. — .....                              | 501 |
| Solimeto v. State .....                   | 170 |
| Sourbier v. Brown .....                   | 554 |
| Southern R. Co., Clift v. ....            | 472 |
| Sperry & Hutchinson Co. v.<br>State ..... | 173 |
| State, Arbuckle v. ....                   | 444 |
| —, Banks v. ....                          | 353 |
| —, Barker v. ....                         | 263 |
| —, — v. ....                              | 493 |
| —, Bass v. ....                           | 21  |
| —, Bennett v. ....                        | 380 |
| —, Berry v. ....                          | 102 |
| —, Bleiweiss v. ....                      | 184 |
| —, Blomberg v. ....                       | 619 |
| —, v. Brumfiel .....                      | 584 |
| —, Clevenger v. ....                      | 592 |
| —, Colondro v. ....                       | 533 |
| —, Dillon v. ....                         | 603 |
| —, Dunville v. ....                       | 373 |
| —, Flinn v. ....                          | 531 |
| —, Goodman v. ....                        | 70  |
| —, Heier v. ....                          | 172 |
| —, Hinshaw v. ....                        | 147 |
| —, — v. ....                              | 447 |
| —, Indianapolis Telephone<br>Co. v. ....  | 724 |
| —, James v. ....                          | 579 |
| —, Jenkins v. ....                        | 510 |
| —, Koehler v. ....                        | 387 |
| —, Marco v. ....                          | 540 |

# CASES REPORTED.

v

|                              |     |
|------------------------------|-----|
| State, O'Daniel v.....       | 477 |
| —, Pierson v.....            | 239 |
| —, Roberts v.....            | 713 |
| —, Robinson v.....           | 467 |
| —, v. Sarlin.....            | 359 |
| —, Scherer v.....            | 14  |
| —, Schulmeyer v.....         | 463 |
| —, Sharp v.....              | 276 |
| —, Smith v.....              | 64  |
| —, — v.....                  | 501 |
| —, Solimeto v.....           | 170 |
| —, Sperry & Hutchinson       |     |
| Co. v. ....                  | 173 |
| —, Staub v.....              | 683 |
| —, v. Surety Coupon Co..     | 723 |
| —, Torphy v.....             | 30  |
| —, Ward v.....               | 606 |
| —, Wheeler v.....            | 228 |
| —, Williams v.....           | 283 |
| —, Young v.....              | 505 |
| —, Zuver v.....              | 60  |
| State, ex rel., Advisory     |     |
| Board, etc. v.....           | 331 |
| —, Arnold v.....             | 222 |
| —, v. City of Indianapolis.  | 685 |
| —, v. Griffith, Judge.....   | 167 |
| —, Indiana State Board       |     |
| of Finance v.....            | 36  |
| —, Poer, Trustee, v.....     | 55  |
| —, Sell, Trustee, v.....     | 671 |
| —, Sisk v.....               | 328 |
| Staub v. State.....          | 683 |
| Steenburg v. Kyle .....      | 26  |
| Sterrett, Stidham v.....     | 507 |
| Stidham v. Sterrett.....     | 507 |
| Surety Coupon Co., State v.. | 723 |

## T

|                              |     |
|------------------------------|-----|
| Templer, Kilgore v.....      | 675 |
| Tolleston Club, etc. v. Car- |     |
| son .....                    | 642 |
| Torphy v. State .....        | 30  |
| Travis, Admx., v. Rochester  |     |
| Bridge Co. ....              | 79  |

## U

|                              |     |
|------------------------------|-----|
| Union Traction Co. v. Berry, |     |
| Admr. ....                   | 514 |

## V

|                              |    |
|------------------------------|----|
| Vandalia R. Co. v. Schnull.. | 87 |
| Van Natta v. Van Natta...    | 75 |

## W

|                           |     |
|---------------------------|-----|
| Ward v. State.....        | 606 |
| Wheeler v. State .....    | 228 |
| Whitesell v. Metsker..... | 1   |
| Williams v. State.....    | 283 |
| Wright v. House.....      | 247 |

## Y

|                     |     |
|---------------------|-----|
| Young v. State..... | 505 |
|---------------------|-----|

## Z

|                     |    |
|---------------------|----|
| Zuver v. State..... | 60 |
|---------------------|----|

# CASES CITED

|                                                                                       |                                                                       |
|---------------------------------------------------------------------------------------|-----------------------------------------------------------------------|
| Advance Elevator, etc., Co.<br>v. Eddy, 23 Ill. App. 352..411                         | Baltimore, etc., R. Co. v.<br>City of Seymour, 154 Ind.<br>17.....239 |
| Aetna Life Ins. Co. v. Jones,<br>173 Ind. 149 ..... 6                                 | — v. Kleespies, 39 Ind.<br>App. 151 .....344                          |
| Aetna Trust, etc., Co. v.<br>Nackenhorst, 188 Ind.<br>621.....692                     | — v. Walborn, 127 Ind.<br>142.....138                                 |
| Agar v. State, 176 Ind. 234.325                                                       | Barber v. Barber, 21 Ind.<br>468.....407                              |
| Akron, etc., R. Co. v. Public<br>Util. Comm., 96 Ohio 359.337                         | Barnard v. Brown, 112 Ind.<br>53.....489                              |
| Allen v. Nofsinger, 13 Ind.<br>494.....664                                            | Barnes v. Phillips, 184 Ind.<br>415.....127                           |
| — v. State, 183 Ind. 37...<br>.....150, 288                                           | Barnhardt v. State, 171 Ind.<br>428..... 22                           |
| — v. —, 52 Ind. 486...595                                                             | Barnhart v. State, 154 Ind.<br>177.....288, 294                       |
| Alsmeier v. Adams, 62 Ind.<br>App. 219 .....695                                       | Barr v. Sumner, 183 Ind.<br>402.....566                               |
| American, etc., Tin Plate Co.<br>v. Reason, 184 Ind. 125...270                        | Bass v. State, 136 Ind. 165..391                                      |
| Anderson v. State, 187 Ind.<br>94.....275                                             | Beauchamp v. State, 6<br>Blackf. 299 .....261                         |
| — v. —, 104 Ind. 467...389                                                            | Bedford, etc., R. Co. v. Rain-<br>bolt, 99 Ind. 551.....              |
| Archer v. State, 106 Ind. 426<br>.....722                                             | .....326, 520, 524                                                    |
| Arkansas Rate Cases, 187<br>Fed. 290 ..... 95                                         | Bedford Quarries Co. v.<br>Bough, 168 Ind. 671.181, 183               |
| Armstrong v. Dunn, 143 Ind.<br>433.....438                                            | Beecher v. Peru Trust Co.,<br>49 Ind. App. 184.....334                |
| Arthur v. Griswold, 55 N. Y.<br>400.....439                                           | Belo v. Fuller, 84 Tex. 450..559                                      |
| Ashland Lime, etc., Co. v.<br>Shores, 105 Wis. 122....694                             | Bennett v. Jackson, 186 Ind.<br>533.....261, 262                      |
| Ashley v. State, 92 Ind. 559.294                                                      | — v. Root Furniture Co.,<br>176 Ind. 606..... 24                      |
| Atchison, etc., R. Co. v.<br>Schneider, 127 Ill. 144...349                            | — v. Simon, 152 Ind. 490.500                                          |
| Atlantic Coast Line v. North<br>Carolina, etc., Commission,<br>206 U. S. 1.....95, 96 | Bess v. Morgan, 55 Ind. App.<br>430.....488                           |
| Bader v. State, 176 Ind. 268<br>.....383                                              | Besette v. State, 101 Ind. 85<br>.....245                             |
| Bailey v. Boyd, 75 Ind. 125...<br>.....668, 670                                       | Binns v. State, 66 Ind. 428..470                                      |
| Baker v. Baker, 43 Ind.<br>App. 26 .....220                                           | Blair v. City of Fort Wayne,<br>51 Ind. App. 652.....267              |
| — v. Becker, 153 Wis. 369<br>.....437                                                 | Blaker v. State, 130 Ind. 203<br>.....461                             |
| — v. State, 183 Ind. 1.... 63                                                         | Blough v. Parry, 144 Ind.<br>463.....245                              |
| Baltes Land, etc., Co. v. Sut-<br>ton, 32 Ind. App. 14.....219                        | Board, etc. v. Fertich, 18<br>Ind. App. 1.....415                     |
| Baltimore, etc., R. Co. v.<br>Bradford, 20 Ind. App.<br>348.....134                   | — v. Harrell, 147 Ind. 500<br>.....591                                |
|                                                                                       | — v. McGregor, 171 Ind.<br>634.....302                                |
|                                                                                       | — v. Nichols, 139 Ind. 611<br>.....384                                |

# CASES CITED.

vii

|                                                                 |          |                                                                           |          |
|-----------------------------------------------------------------|----------|---------------------------------------------------------------------------|----------|
| Board, etc. v. O'Conner, 137 Ind. 622 .....                     | 694      | Buehner Chair Co. v. Feulner, 164 Ind. 368.....                           |          |
| — v. Scanlan, 178 Ind. 142.....                                 | 604      | .....117, 118, 390                                                        |          |
| Bohr v. Neuenschwander, 120 Ind. 449 .....                      | 500      | Burdick v. Cheadle, 26 Ohio St. 393 .....                                 | 83       |
| Boland v. Claudel, 181 Ind. 295.....                            | 222      | Burke v. State, 47 Ind. 528. 63                                           |          |
| Bonnell v. Delaware, etc., R. Co., 39 N. J. Law 189.....        | 124      | Burrow v. Terre Haute, etc., R. Co., 107 Ind. 432.....                    | 407      |
| Boor, Admr., v. Lowrey, 103 Ind. 468 .....                      | 500      | Burrows v. State, 137 Ind. 474.....                                       | 281      |
| Boos v. State, 181 Ind. 562..                                   | 23       | Buser v. Shepard, 107 Ind. 417.....                                       | 491      |
| Born v. Union Elevator Co., (Ind. App.), 118 N. E. 973 .....    | 73       | Caldwell v. State, ex rel., 187 Ind. 617.....                             | 371      |
| Boxell v. Bright Nat. Bank, 184 Ind. 631.....                   | 267      | — v. Ulsh, 184 Ind. 725.....                                              | 270      |
| Boyle v. Agawam Canal Co., 22 Pick. (Mass.) 381.....            | 209, 211 | Campbell v. Gates, 17 Ind. 126.....                                       | 667      |
| Brady v. Gregory, 49 Ind. App. 355 .....                        | 651      | — v. State, 148 Ind. 527. 383                                             |          |
| — v. Sweetland, 13 Kan. 41.....                                 | 366      | Cannon v. Cleveland, etc., R. Co., 157 Ind. 682.....                      | 239      |
| Bram v. United States, 168 U. S. 532.....                       | 110      | Card v. State, 109 Ind. 415. 718                                          |          |
| Bray v. Tardy, 182 Ind. 98. 269                                 |          | Carleton v. People, 10 Mich. 249.....                                     | 371      |
| Breadheft v. Cleveland, 184 Ind. 130 .....                      | 271      | Carr v. State, 175 Ind. 241. 495                                          |          |
| Bristol Hydraulic Co. v. Boyer, 67 Ind. 236.....                | 407      | Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47.....                    | 83       |
| Broerman v. Spilker, 183 Ind. 88 .....                          | 352      | C. Callahan Co. v. Wall Rice, etc., Co., 44 Ind. App. 372 .....           | 301, 503 |
| Broker v. Scobey, 56 Ind. 588.....                              | 407      | Central Trust Co. v. Wabash, etc., R. Co., (C. C.) 27 Fed. 159.....       | 123      |
| Brooster v. State, 15 Ind. 190.....                             | 583      | Central Union Telephone Co. v. Fehring, 146 Ind. 189..                    | 74       |
| Brophy v. Richeson, 187 Ind. 114.....                           | 652      | Chambers v. Lancaster, 160 N. Y. 342.....                                 | 692      |
| Brown v. Terre Haute, etc., Traction Co., 63 Ind. App. 327..... | 446      | Chapman & Co. v. Montgomery Water Power Co., 126 Fed. 372.....            | 210      |
| Brown, etc., Co. v. Susquehanna Boom Co., 109 Pa. St. 57 .....  | 210      | Chapman & Dewey v. St. Francis, 232 U. S. 186....                         | 656      |
| Brown, Treas., v. Baltimore, etc., R. Co., 186 Ind. 81....      | 591      | Cheadle v. State, 110 Ind. 301.....                                       | 63       |
| Brown University v. Rhode Island College, 56 Fed. 55. 52        |          | Cheney v. State, ex rel., 165 Ind. 121 .....                              | 608      |
| Brown's Lessee v. Clements, 3 How. 650 .....                    | 655      | Chesapeake, etc., R. Co. v. Public Service Commission, 75 W. Va. 100..... | 95       |
| Bruce v. Osgood, 154 Ind. 375.....                              | 30       | Chicago, etc., R. Co. v. City of Chicago, 217 Ill. 343....                | 349      |
| — v. Seaboard, etc., Railway Corp., 52 Fla. 461....             | 238      | — v. Dinius, 180 Ind. 596. 267                                            |          |
| Brunaugh v. State, 173 Ind. 483.....                            | 17, 453  | — v. Hall, 135 Ind. 91....                                                | 91       |
| Buck v. Hawley, 129 Iowa 406.....                               | 371      | — v. Lake Co. Savings, etc., Co., 186 Ind. 358....                        | 467      |
|                                                                 |          | — v. McGuire, 219 U. S. 549.....                                          | 179      |

|                                                                 |          |                                                             |     |
|-----------------------------------------------------------------|----------|-------------------------------------------------------------|-----|
| Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418....           | 201, 202 | Clark v. Middlesworth, 82 Ind. 240 .....                    | 709 |
| — v. Pritchard, 168 Ind. 398.....                               | 135      | Clearspring Tp. v. Blough, 173 Ind. 15 .....                | 498 |
| — v. Railroad Comm., etc., 175 Ind. 630.....                    | 201      | Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108 ..... | 492 |
| — v. Railroad Comm., 152 Wis. 654 .....                         | 95, 97   | — v. Born, 49 Ind. App. 62.....                             | 407 |
| Chipman v. Palmer, 77 N. Y. 51.....                             | 568      | — v. Coffman, 30 Ind. App. 462 .....                        | 124 |
| Christy v. Holmes, 57 Ind. 314.....                             | 128      | — v. Hadley, 170 Ind. 204 .....                             | 415 |
| Cincinnati, etc., R. Co. v. Gross, 186 Ind. 471.....            | 165      | — v. Heine, 28 Ind. App. 163.....                           | 124 |
| — v. McCullom, 183 Ind. 556.....                                | 367      | — v. King, 23 Ind. App. 573.....                            | 404 |
| — v. Washburn, 25 Ind. 259.....                                 | 500      | — v. Lynn, 171 Ind. 589.....                                | 136 |
| Citizens Street R. Co. v. Heath, 154 Ind. 363.....              | 344      | — v. Marshall, 182 Ind. 280.....                            | 608 |
| City of Auburn v. State, ex rel., 170 Ind. 511.....             | 697      | — v. Parker, 154 Ind. 153 .....                             | 164 |
| City of Bloomington v. Moore, 183 Ind. 283.....                 | 466      | — v. Schneider, 40 Ind. App. 38 .....                       | 124 |
| City of Bluffton v. Miller, 33 Ind. App. 521.....               | 694      | — v. Simpson, 182 Ind. 693.....                             | 222 |
| City of Decatur v. Eady, 186 Ind. 205 .....                     | 531      | — v. Wise, 186 Ind. 316.....                                | 350 |
| City of Detroit v. Detroit, etc., R. Co., 23 Mich. 173.....     | 238      | — v. Woodbury Glass Co. (Ind. App.), 120 N. E. 426 .....    | 391 |
| City of Fort Wayne v. Bender, 57 Ind. App. 689.....             | 267      | Clifton v. McMains, 184 Ind. 539.....                       | 29  |
| — v. Shoaff, 106 Ind. 66.....                                   | 694      | Clute v. Fisher, 65 Mich. 48.....                           | 655 |
| City of Indianapolis v. American, etc., Co., 176 Ind. 510 ..... | 255, 438 | Coach v. Gage, 70 Ore. 182.....                             | 617 |
| — v. Keeley, 167 Ind. 516.....                                  | 117      | Cole v. People, 84 Ill. 216.....                            | 152 |
| — v. Stokes, 182 Ind. 31.....                                   | 415      | Colea v. State, 75 Ind. 511.....                            | 535 |
| City of Lafayette v. James, 92 Ind. 240.....                    | 668      | Commissioner, etc. v. Wash R. Co., 126 Mich. 113.....       | 95  |
| — v. Nagle, 113 Ind. 425.....                                   | 404      | Commonwealth v. Berry, 29 Ky. Law 234.....                  | 304 |
| — v. Wortman, 107 Ind. 404.....                                 | 407      | — v. Davis, 75 Ky. 240.....                                 | 357 |
| City of Laporte v. Gamewell, etc., Tel. Co., 146 Ind. 466.....  | 610      | — v. Fogerty, 8 Gray (Mass.) 489 .....                      | 278 |
| City of North Vernon v. Voegler, 103 Ind. 314.....              | 405      | — v. Maloney, 145 Mass. 205.....                            | 69  |
| City of Rockford v. Mower, 259 Ill. 604 .....                   | 348      | Connell v. Southern R. Co., 91 Fed. 466.....                | 137 |
| City of South Bend v. Hardy, 98 Ind. 577.....                   | 245      | Connors v. State, 183 Ind. 618.....                         | 34  |
| City of Terre Haute v. Lauda, 58 Ind. App. 480.....             | 267      | Conrad v. State, 144 Ind. 290 .....                         | 457 |
| City of Valparaiso v. Moffitt, 12 Ind. App. 250.....            | 568      | Cook v. State, 169 Ind. 430.....                            | 718 |
| City Street Improvement Co. v. Marysville, 155 Cal. 419 .....   | 694      | Coolman v. State, 163 Ind. 503.....                         | 392 |
|                                                                 |          | Cooper v. Douglass, 44 Barb. 409.....                       | 631 |
|                                                                 |          | — v. State, 120 Ind. 377.....                               | 384 |
|                                                                 |          | Copeland v. Manton, 22 Ohio St. 398 .....                   | 636 |

|                                                          |             |                                                                        |                    |
|----------------------------------------------------------|-------------|------------------------------------------------------------------------|--------------------|
| Couch v. State, ex rel., 169 Ind. 269.....               | 224         | DuBois v. State, 87 Ala. 101.....                                      | 356                |
| County of Glenn v. Jones, 146 Cal. 518.....              | 670         | Dukes v. State, 11 Ind. 557..                                          | 302                |
| Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258....     | 500, 501    | Duncan v. State, 110 Ark. 523.....                                     | 388                |
| Creighton v. Hoppis, 99 Ind. 369.....                    | 220         | Dunham v. Jones, 184 Ind. 46.....                                      | 164, 165           |
| Cumberland Tel., etc., Co. v. Hatter, 44 Ind. App. 625.. | 323         | Dunn v. State, 166 Ind. 694.                                           | 471                |
| Cunningham v. Gwinn, 4 Blackf. 341.....                  | 664         | Eacock v. State, 169 Ind. 488.....                                     | 150, 292           |
| — v. Hoff, 118 Ind. 263....                              | 216         | Earl v. Chicago, 136 Ill. 277.....                                     | 238                |
| Currier v. Elliott, 141 Ind. 394.....                    | 492         | Eastman v. State, 109 Ind. 278.....                                    | 608                |
| Curtin v. Somerset, 140 Pa. 70.....                      | 83          | East St. Louis, etc., Railway v. Illinois Trust Co., 248 Ill. 559..... | 350                |
| Curtis v. State, 89 Ark. 394.                            | 278         | Edwards v. Ogle, 76 Ind. 302.....                                      | 654                |
| Cutler v. State, 15 Ariz. 343.                           | 278         | Ellingham v. Dye, 178 Ind. 386.....                                    | 261                |
| Daly v. Gubbins, 170 Ind. 105.....                       | 225, 227    | — v. —, 231 U. S. 205..                                                | 261                |
| Darby v. Vinnedge, 53 Ind. App. 525.....                 | 313         | English v. English, 182 Ind. 675.....                                  | 328                |
| Darling v. Kelly, 113 Mass. 29.....                      | 407         | Equitable Accident Ins. Co. v. Stout, 135 Ind. 444....                 | 311                |
| Darter v. Grubb, 56 Ind. App. 206.....                   | 325         | Ervin v. State, ex rel., 150 Ind. 332.....                             | 488, 501           |
| Daugherty v. Herzog, 145 Ind. 255.....                   | 83          | Erwin v. Jersey City, 6 N. J. Law 141.....                             | 371                |
| Davis v. State, 100 Ind. 154.....                        | 363, 465    | Evans v. State, 150 Ind. 651.                                          | 75                 |
| Dawson v. Hipskind, 173 Ind. 216.....                    | 695         | Evansville, etc., R. Co. v. Berndt, 172 Ind. 697.....                  | 117, 122, 123, 136 |
| Deal v. State, 140 Ind. 354..                            | 128         | — v. Hawkins, 111 Ind. 549.....                                        | 717                |
| Delaware, etc., Co. v. Larnard, 161 Fed. 520.....        | 123         | Evansville, etc., Traction Co. v. Spiegel, 49 Ind. App. 412.....       | 566                |
| Detro v. State, 4 Ind. 200..                             | 34, 716     | Everett v. Great Northern R. Co., 100 Minn. 309....                    | 133                |
| Dill v. Frazee, 169 Ind. 53..                            | 509         | Ex Parte McKenna, 126 Cal. 429.....                                    | 177                |
| Dinwiddie v. Town of Rushville, 37 Ind. 66.....          | 226, 227    | Ex Parte Parks, 3 Mont. 426.....                                       | 371                |
| Dixon v. Poe, 159 Ind. 492..                             | 181         | Ex Parte Spencer, 228 U. S. 652.....                                   | 368                |
| Dolan v. O'Toole, 129 Cal. 488.....                      | 552         | Ex Parte United States, 242 U. S. 27.....                              | 70                 |
| Dollar Savings Bank v. United States, 19 Wall. 227.....  | 91          | Fahnestock v. State, 102 Ind. 156.....                                 | 363, 466           |
| Domestic Block Coal Co. v. DeArmey, 179 Ind. 592....     | 325, 439    | Fallbrook Irrigation District v. Bradley, 164 U. S. 112.               | 252                |
| Donovan v. State, 185 Ind. 15.....                       | 73, 495     | Fee v. Moore, 74 Ind. 319....                                          | 491                |
| — v. —, 170 Ind. 123..                                   | 17, 73, 495 | Firemen's, etc., Assn. v. Lounsbury, 21 Ill. 510....                   | 261                |
| Dorsey v. State, 179 Ind. 531.....                       | 268, 271    | Fisher v. Blumhardt, 182 Ind. 603.....                                 | 6                  |
| Drake v. State, 145 Ind. 210.....                        | 494         |                                                                        |                    |

|                                                             |                                                              |
|-------------------------------------------------------------|--------------------------------------------------------------|
| Fitzgerald v. Long Island R. Co., 10 N. Y. St. Rep. 433.123 | Haehnel v. Seidentopf, 63 Ind. App. 218.....331              |
| Fletcher v. State, 2 Okl. Cr. 300.....294                   | Hague v. Inhabitants, etc., 23 N. J. Eq. 354.....238         |
| — v. State Capital Bank, 37 N. H. 369.....91                | Hahn v. State, 185 Ind. 210.....73, 495                      |
| Forsyth v. Wilcox, 143 Ind. 144.....384                     | Haire v. Rice, 204 U. S. 291. 51                             |
| Fox v. Cox, 20 Ind. App. 61.220                             | Halbert v. Wabash R. Co., 151 Ill. App. 352.....133          |
| Fraley v. Fraley, 150 N. C. 501.....236                     | Hall v. McDonald, 171 Ind. 9.....9                           |
| Freeman v. State, 119 Ind. 501.....275                      | Halstead v. Stahl, 47 Ind. App. 600.....438                  |
| Fritz v. State, 178 Ind. 463. 19                            | Hammond Packing Co. v. State, 81 Ark. 519.....180            |
| Funk v. State, 149 Ind. 338.297                             | Hampton v. State, 160 Ind. 575.....281                       |
| Garbracht v. Commonwealth, 96 Pa. 449.....356               | Hanly v. Sims, 175 Ind. 345.....258, 367                     |
| Gary, etc., R. Co. v. Gunn, 184 Ind. 306.....420            | Hardaway v. National Surety Co., 211 U. S. 552.....636       |
| Gary Land Co. v. Griesel, 179 Ind. 204.....652, 654         | Hardin v. Jordan, 140 U. S. 371.....654, 656                 |
| Gazzum v. Phillips' Lessee, 20 How. 372.....655             | — v. State, 22 Ind. 347...301                                |
| George v. Amos, 173 Ind. 149.....6                          | Harmon v. Bolley, 187 Ind. 511.....253, 254, 589             |
| German Alliance Ins. Co. v. Kansas, 233 U. S. 389...179     | Harper v. State, 185 Ind. 322.....272                        |
| Gilmore v. State, 177 Ind. 148.....512                      | Harris v. State, 155 Ind. 15.494                             |
| Glantz v. Gardiner, 40 R. I. 297.....617                    | Harvey v. State, 80 Ind. 142.607                             |
| Glover v. State, 109 Ind. 391.....295, 456                  | Hauk v. State, 148 Ind. 238.....280, 281                     |
| Godman v. Smith, 17 Ind. 152.....489                        | Hauschild v. Roth, 181 Ind. 183.....29                       |
| Godwin v. Murchison, 145 N. C. 320.....630                  | Hawkins v. State, 136 Ind. 630.....389                       |
| Goecker v. McOsker, 177 Ind. 607.....500                    | Hays v. Hogan, 273 Mo. 1. 143                                |
| Goodman v. State, 188 Ind. 70.....467, 495                  | — v. Perkins, 22 Tex. Civ. App. 198.....560                  |
| Gould v. Cayuga County Nat. Bank, 99 N. Y. 333..442         | Heath v. Sheetz, 164 Ind. 665.....13                         |
| Grand Trunk, etc., R. Co. v. Reynolds, 175 Ind. 161...117   | — v. State, 173 Ind. 296. 273                                |
| Gray v. State, 107 Ind. 177.. 67                            | Hedderich v. State, 101 Ind. 564.....261                     |
| Green v. State, 157 Ind. 101.....150, 288, 295              | Hedekin Land, etc., Co. v. Campbell, 184 Ind. 643...161, 420 |
| Greer v. State, 50 Ind. 267.. 382                           | Hedrick v. Hedrick, 128 Ind. 522.....77                      |
| Griffith v. State, 36 Ind. 406.....456, 457                 | Heitz v. Knox County, etc., Tel. Co., 46 Ind. App. 485.138   |
| Groff v. Clark, 146 Ind. 52..267                            | Heizer v. Kingsland, etc., Mfg. Co., 110 Mo. 605...84, 85    |
| Grundel v. People, 33 Colo. 191.....68                      | Henderson v. New York, etc., R. Co., 78 N. Y. 423....405     |
| Guillotte v. Poincy, 41 La. Ann. 333 .....367               | Hickman v. Rayl, 55 Ind. 551.....665                         |
| Hadcock v. Osmer, 153 N. Y. 604.....439                     | Hinkle v. State, 174 Ind. 276.....458                        |

|                                                                                           |                                                                                |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| Hinshaw v. State, 188 Ind.<br>147.....454, 455                                            | Indianapolis Sun Co. v. Hor-<br>rell, 53 Ind. 527.....559                      |
| — v. —, 147 Ind. 334....                                                                  | Indianapolis Union R. Co. v.<br>Neubacher, 16 Ind. App.<br>21.....123          |
| Hodgin v. Hodgin, 175 Ind.<br>167.....344                                                 | Inland Steel Co. v. Gillespie,<br>181 Ind. 633.....146                         |
| Hogue v. McClintock, 76 Ind.<br>205.....220                                               | In re Flint, 25 Utah 338..68, 69                                               |
| Holden v. City of Alton, 179<br>Ill. 318 .....491                                         | In re Peterson, 19 Idaho<br>433.....70                                         |
| — v. Hardy, 14 Utah 71..260                                                               | International, etc., Loan<br>Assn. v. Watson, 158 Ind.<br>508.....218          |
| Hollon v. State, 186 Ind.<br>374.....383, 386                                             | Interstate Com. Comm. v.<br>Louisville, etc., R. Co., 227<br>U. S. 88 .....201 |
| Home Ins. Co. v. Howard,<br>111 Ind. 544.....436                                          | Isgrigg v. Pauley, 148 Ind.<br>436.....492                                     |
| Home Stove Co. v. Bishop,<br>(Ind. App.) 119 N. E. 152<br>.....24                         | Ishie v. Norton Co., 183<br>App. Div. 94.....443                               |
| Howard v. Twibell, 179 Ind.<br>67.....651                                                 | Isman v. Loring, 130 App.<br>Div. 845 .....438                                 |
| Huffman v. Huffman, 51 Ind.<br>App. 330 .....313                                          | Jackson v. United States,<br>102 Fed. 473 .....299                             |
| Humes v. City of Little<br>Rock, 138 Fed. 929.....177                                     | Janik v. Ford Motor Co., 180<br>Mich. 557 .....143                             |
| Hundley v. State, 173 Ind.<br>684.....20                                                  | Jeffries v. Lamb, 73 Ind. 202<br>.....668                                      |
| Hungerford v. Redford, 29<br>Wis. 345 .....411                                            | Johnson v. Hosford, 110 Ind.<br>572.....500                                    |
| Hunt v. State, 186 Ind. 644.173                                                           | Johnston v. Jones, 23 N. J.<br>Eq. 216 .....371                                |
| Huntingburg Bank v. Mor-<br>genroth, 64 Ind. App. 315.331                                 | Jones v. State, 64 Ind. 473..718                                               |
| Hurtado v. California, 110<br>U. S. 516.....261                                           | Jordan v. Indianapolis Wa-<br>ter Co., 159 Ind. 337....490                     |
| Huset v. J. I. Case, etc., Co.,<br>120 Fed. 865.....84, 86                                | Joy v. State, 14 Ind. 139...<br>.....456, 457                                  |
| Illinois, etc., R. Co. v. Haw-<br>kins, 66 Ind. App. 312....567                           | Judah v. Zimmerman, 22<br>Ind. 388 .....666, 668                               |
| Illyes v. White River Light,<br>etc., Co., 175 Ind. 118....653                            | Kane v. Clough, 36 Mich.<br>436.....630                                        |
| Indiana, etc., R. Co. v.<br>Adams, 112 Ind. 302.....25                                    | Kansas City, etc., R. Co. v.<br>Anderson, 233 U. S. 325..473                   |
| — v. Eberle, 110 Ind. 542.404                                                             | Kaufman v. Alexander, 173<br>Ind. 136 .....259                                 |
| Indiana Harbor Belt R. Co.<br>v. Public Service Commis-<br>sion, 187 Ind. 660....203, 339 | Kean v. Calumet Canal Co.,<br>190 U. S. 452...654, 655, 656                    |
| Indiana Steel, etc., Co. v.<br>Studes, 187 Ind. 468.....443                               | — v. Roby, 145 Ind. 221..652                                                   |
| Indiana Union Traction Co.<br>v. Love, 180 Ind. 442....325                                | Keith v. State, 157 Ind. 376.187                                               |
| Indianapolis Abattoir Co. v.<br>Bailey, 54 Ind. App. 370..436                             | Kelley v. Bell, 172 Ind. 590..<br>.....74, 500                                 |
| Indianapolis, etc., R. Co. v.<br>Lewis, 119 Ind. 218.....235                              | Kelly v. New York, etc., R.<br>Co., 81 N. Y. 233.....410                       |
| — v. McLin, 82 Ind. 435..133                                                              | — v. Pittsburgh, 104 U. S.<br>78.....254                                       |
| — v. Reynolds, 116 Ind.<br>356.....235                                                    | Kendall v. State, 183 Ind.<br>162.....74                                       |
| Indianapolis St. R. Co. v.<br>Schomberg, 164 Ind. 111..78                                 | Kenningham v. State, 120<br>Ind. 322 .....480                                  |



|                                                          |                                                                      |
|----------------------------------------------------------|----------------------------------------------------------------------|
| Keyes v. State, 122 Ind. 527. 243                        | Lewis v. Board, etc., 74 N. C. 194.....304                           |
| Keyser v. Sutherland, 59 Mich. 455.....655               | — v. Metropolitan Life Ins. Co., 178 Mass. 52....159                 |
| Kidwell v. State, 68 Ind. 384.....273                    | — v. Terry, 111 Cal. 39....85                                        |
| — v. —, 35 Tex. Cr. R. 264.....110                       | Life Assurance Co. v. Haughton, 31 Ind. App. 626.....663             |
| Kinmore v. Cresse, 53 Ind. App. 693.....323, 326         | Lime City Bldg., etc., Assn. v. Black, 136 Ind. 544....487           |
| Kintz v. Scully Steel, etc., Co., 184 Ind. 169.....631   | Lindeman v. New York, etc., R. Co., 11 N. Y. St. Rep. 837.....123    |
| Kirk v. Macy, 53 Ind. App. 17.....489                    | Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61....182            |
| Klein v. State, 157 Ind. 146.....24, 267                 | Logan v. Cincinnati, etc., R. Co., 139 Ky. 202.....85                |
| Krause v. Board, etc., 162 Ind. 278.....211              | Lohr v. Metropolitan Ele. R. Co., 10 N. E. 528.....405               |
| Krumm v. Beach, 96 N. Y. 398.....441                     | Long v. State, 56 Ind. 182...389                                     |
| Kuelling v. Lean Mfg. Co., 183 N. Y. 78.....86           | Loop v. Litchfield, 42 N. Y. 351.....85                              |
| LaGrange v. Coyle, 50 Ind. App. 140.....663              | Losee v. Clute, 51 N. Y. 494..84                                     |
| Lake Agr'l Co. v. Brown, 186 Ind. 30.....350             | Lotz v. Briggs, 50 Ind. 346..685                                     |
| Lake Erie, etc., R. Co. v. Hoff, 25 Ind. App. 239....164 | Louisville, etc., R. Co. v. Snyder, 117 Ind. 435....524              |
| Lake Shore, etc., R. Co. v. Smith, 131 Ind. 512.....257  | Louisville, etc., Traction Co. v. Montgomery, 186 Ind. 384.....717   |
| Lamb v. Lamb, 105 Ind. 456. 129                          | — v. Walker, 177 Ind. 38.....522, 523                                |
| Landringham v. State, 49 Ind. 186.....150, 155, 292      | Lourie Mfg. Co. v. Cincinnati, etc., R. Co., 42 I. C. C. 448.....389 |
| Lang v. Bayonne, 74 N. J. Law 455.....372                | Low v. Dallas, 165 Ind. 392.....225, 227                             |
| — v. Scott, 1 Blackf. 405. 91                            | — v. Pew, 108 Mass. 347. 630                                         |
| Laramore v. Blumenthal, 58 Ind. App. 597.....488         | Lowe v. Board, etc., 156 Ind. 163.....255, 257                       |
| Latham v. United States, 226 Fed. 420.....307            | Lucas v. State, 173 Ind. 302. 266                                    |
| Lavene v. Friedrichs, 186 Ind. 333.....563               | Luckett v. Reighard, 248 Pa. St. 24.....143                          |
| Lay v. State, 180 Ind. 1....23                           | Luther v. State, 177 Ind. 619.....186, 187                           |
| Laycock v. Moon, 97 Wis. 59.....694                      | Lynip v. Alturas School Dist., 24 Cal. App. 426...692                |
| Leach v. State, 177 Ind. 234.....274, 458                | McAdams v. Bailey, 169 Ind. 518.....216                              |
| Ledgerwood v. State, 134 Ind. 81.....67                  | McCarty v. Williams, 58 Ind. App. 440.....663                        |
| Lee v. State, 156 Ind. 541..187                          | McClanahan v. Williams, 136 Ind. 30.....500                          |
| — v. —, 69 Ga. 705....299                                | McConnell v. Hanna, 96 Ind. 102.....220                              |
| Leggett v. Humphreys, 62 U. S. (21 How.) 66.....669      | McCoy v. Barns, 136 Ind. 378.....221                                 |
| Lengelsen v. McGregor, 162 Ind. 258.....331              | McDonald v. Huestis, 1 Ind. App. 275.....664                         |
| Leonard v. Wood, 33 Ind. App. 83.....653                 |                                                                      |
| Levy v. Langridge, 4 M. & W. 337.....86                  |                                                                      |

- McDonald v. McDonald, 142 Ind. 55.....499
- McDonnell v. De Soto Savings, etc., Assn., 175 Mo. 250.....217
- McGreenery v. Murphy, 76 N. H. 338.....615
- McGuffey v. McClain, 130 Ind. 827.....500
- McGuire v. Chicago, etc., R. Co., 131 Iowa 340.....260
- v. State, 50 Ind. 284.....382
- McIntyre v. State, 170 Ind. 163.....610
- McKee v. State, 111 Ind. 378.....293, 294
- McKeen v. A. T. Bowen & Co., 182 Ind. 333.....270
- McLeod v. Spencer, 21 Okla. 165.....410
- McMurrin v. Hannum, 185 Ind. 326.....340
- McNulty v. State, (Ind.), 125 N. E. 41.....685
- McShane v. City of Moberly, 79 Mo. 41.....238
- Magee v. Manhattan Life Ins. Co., 92 U. S. 93.....668
- Malone v. State, 179 Ind. 184.....383, 386
- Manship v. Stewart, 181 Ind. 299.....127
- Marion Trust Co. v. Robinson, 184 Ind. 291.....426
- Markland, etc., Co. v. Kimmel, 87 Ind. 560.....668
- Martinowsky v. City of Hannibal, 35 Mo. App. 70....567
- Mason v. Calumet Canal, etc., Co., 150 Ind. 699.....652
- Massachusetts Agrl. College v. Marden, 156 Mass. 150. 52
- Matter of Lands in Town of Flatbush, 60 N. Y. 398....590
- Mead v. Burk, 156 Ind. 577.717
- Melville v. State, 173 Ind. 352.....301
- Mercer v. State, 179 Ind. 426. 23
- Merrill v. State, 156 Ind. 99.494
- Messel v. State, 176 Ind. 214.....73, 495
- Metsker v. Whitsell, 181 Ind. 126.....3, 9, 13
- Meyers v. State, 163 Ind. 345.....24
- Michigan, etc., Ins. Co. v. Naugle, 180 Ind. 79.....437
- Miller v. Butler, 60 Mass. (6 Cush.) 71.....559
- Miller v. City of Indianapolis, 123 Ind. 196.....238
- v. Highland Ditch Co., 87 Cal. 430.....568
- v. State, 42 Fla. 266....806
- v. Stewart, 22 U. S. (9 Wheat.) 680....666, 667, 668
- Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257.....95, 98
- Minnesota Rate Cases, 230 U. S. 352.....95
- , 230 U. S. 433, 434....96
- Missouri Pacific R. Co. v. Kansas, 216 U. S. 262....95
- Missouri Rate Cases, 230 U. S. 474.....95
- Mitchell v. Friedley, 126 Ind. 545.....500
- v. Hancock Co., 91 Miss. 414.....210
- v. Smale, 140 U. S. 406.....656
- M. O'Conner Co. v. Gillaspay, 170 Ind. 428.....146
- Moore v. Shields, 121 Ind. 267.....721
- v. United States, 160 U. S. 268.....454
- Morgan v. Commonwealth, 172 Ky. 684.....272
- v. Hoadley, 156 Ind. 320.....216
- v. State, 13 Ind. 215....274
- Morris v. State, 104 Ind. 457.....35, 716
- Moss v. Jenkins, 146 Ind. 589.....489
- Moulder v. Kempff, 115 Ind. 459.....716
- Mount v. State, ex rel., 90 Ind. 29.....261
- Musgrave v. State, 133 Ind. 297.....384
- Nash v. Minnesota Title, etc., Co., 163 Mass. 574.....439
- Nation v. Green, 65 Ind. App. 136.....699
- National Surety Co. v. Maag, 43 Ind. App. 16....634
- Needham v. Wright, 140 Ind. 190.....503
- Newcastle Bridge Co. v. Doty, 168 Ind. 259.....216
- Newport v. State, 140 Ind. 299.....392
- Nichols v. Baltimore, etc., R. Co., 83 Ind. App. 229....123

|                                                                                                            |                  |                                                                                   |               |
|------------------------------------------------------------------------------------------------------------|------------------|-----------------------------------------------------------------------------------|---------------|
| Niswonger v. State, 179 Ind.<br>653.....                                                                   | 383              | Parsons v. Durand, 150 Ind.<br>203.....                                           | 366, 368      |
| Nitka v. Western Union Tel.<br>Co., 149 Wis. 106.....                                                      | 261              | Patrick v. State, 16 Neb. 330<br>.....                                            | 299           |
| Noble v. Davison, 177 Ind. 19<br>.....                                                                     | 164, 425         | Patten v. Stewart, 24 Ind.<br>332.....                                            | 490           |
| Norfolk, etc., R. Co. v. Con-<br>ley, 236 U. S. 605.....                                                   | 95               | Peck v. Hibben, 185 Ind. 623<br>.....                                             | 615           |
| — v. Earnest, 229 U. S.<br>114.....                                                                        | 420              | Pence v. Myers, 180 Ind. 282<br>.....                                             | 129           |
| — v. Gesswine, 144 Fed.<br>56.....                                                                         | 133              | — v. Waugh, 135 Ind. 143. 384<br>Pennsylvania Co. v. Marion,<br>104 Ind. 239..... | 524           |
| North American Union v.<br>Oleske, 64 Ind. App. 435..                                                      | 331              | — v. Sears, 136 Ind. 460..                                                        | 326           |
| Northern Pacific R. Co. v.<br>North Dakota, 236 U. S.<br>585.....                                          | 95, 99, 100, 101 | — v. Stegemeier, Admx.,<br>118 Ind. 305....                                       | 118, 123, 124 |
| — v. —, 216 U. S. 579<br>.....                                                                             | 96, 576          | People v. Allen, 155 Ill. 61..                                                    | 69            |
| Northrop v. Hill, 57 N. Y.<br>351.....                                                                     | 438              | — v. Barnes, 182 Mich.<br>179.....                                                | 376, 379      |
| Norton v. Sewall, 106 Mass.<br>143.....                                                                    | 86               | — v. Barrett, 202 Ill. 287..                                                      | 69            |
| — v. Shelby County, 118<br>U. S. 425.....                                                                  | 372              | — v. Borgstrom, 178 N. Y.<br>254.....                                             | 299           |
| Norwood v. Baker, 172 U. S.<br>269.....                                                                    | 253              | — v. Bright, 157 Cal. 663. 305<br>— v. Burke, 34 Cal. 661..                       | 278           |
| Ochs v. Woods, 221 N. Y. 335<br>.....                                                                      | 439              | — v. Deatrick, 30 Cal.<br>App. 507.....                                           | 270           |
| Ogden v. United States, 112<br>Fed. 523.....                                                               | 685              | — v. Edwards, 173 App.<br>Div. 375.....                                           | 270           |
| Ohio, etc., R. Co. v. Cray-<br>craft, 5 Ind. App. 335....                                                  | 323              | — v. Felker, 61 Mich. 110..                                                       | 69            |
| — v. Trapp, 4 Ind. App.<br>69.....                                                                         | 407              | — v. Gillson, 109 N. Y. 389<br>.....                                              | 177           |
| Olds Motor Works v. Shaf-<br>fer, 145 Ky. 616.....                                                         | 85, 86           | — v. Gray, 251 Ill. 431... 272<br>— v. Kennedy, 58 Mich.<br>372.....              | 68, 69        |
| Opperman v. Citizens' Bank,<br>44 Ind. App. 401.....                                                       | 214              | — v. Lapham, 162 Mich.<br>394.....                                                | 358           |
| Oregon R. & N. Co. v. Fair-<br>child, 224 U. S. 510..                                                      | 201, 337         | — v. Nolan, 33 Cal. App.<br>493.....                                              | 482           |
| Osburn v. State, 164 Ind. 262<br>.....                                                                     | 19               | — v. Northup, 184 Ill.<br>App. 638.....                                           | 302           |
| O'Toole v. Tudor, 175 Ind.<br>227.....                                                                     | 29               | — v. Stowers, 254 Ill. 588. 278<br>— v. Thompson, 212 N. Y.<br>249.....           | 271, 272      |
| Owen County Council v.<br>State, ex rel., 175 Ind. 610<br>.....                                            | 691              | People, ex rel. v. Schatz, 50<br>App. Div. 544.....                               | 506           |
| Padgett v. State, 167 Ind.<br>179.....                                                                     | 292, 294         | — v. Wemple, 138 N. Y. 1<br>.....                                                 | 179           |
| Palmer v. N. Y. News Pub.<br>Co., 31 App. Div. 210....                                                     | 560              | Perkins v. Hayward, 124 Ind.<br>445.....                                          | 500           |
| Parker v. State, 136 Ind. 284<br>.....                                                                     | 245              | Peterson v. Standard Oil Co.,<br>55 Ore. 511.....                                 | 86            |
| — v. —, 133 Ind. 178... 367<br>Parks v. State, 159 Ind. 211. 382<br>Parmalee v. State, 99 Neb.<br>598..... | 270              | Pettit v. State, 135 Ind. 393<br>.....                                            | 35, 716       |
|                                                                                                            |                  | Pichon v. Martin, 35 Ind.<br>App. 167.....                                        | 391           |
|                                                                                                            |                  | Pidcock v. Bishop, 3 B. & C.<br>605.....                                          | 667           |
|                                                                                                            |                  | Pitney v. Washington, 240<br>U. S. 387.....                                       | 178           |

# CASES CITED.

xv

|                                                                       |                  |                                                           |          |
|-----------------------------------------------------------------------|------------------|-----------------------------------------------------------|----------|
| Pittsburgh, etc., R. Co. v. Bir, 56 Ind. App. 598.....                | 323              | Republic Iron, etc., Co. v. State, 160 Ind. 379.....      | 604      |
| — v. Farmers Trust, etc., Co., 183 Ind. 287.....                      | 162              | Republic of Hawaii v. Pedro, 11 Hawaiian 287.....         | 70       |
| — v. Miller, 187 Ind. 684.....                                        | 722, 724         | Reynolds v. Great Northern R. Co., 69 Fed. 808.....       | 138      |
| — v. Moore, 152 Ind. 345.....                                         | 164              | Rhodes v. Driver, 69 Ark. 606.....                        | 366      |
| — v. Pence, 185 Ind. 495.....                                         | 269              | Rice v. State, 16 Ind. 298.....                           | 504      |
| — v. Railroad Commission, 171 Ind. 189.....                           | 201              | Rich v. C. Callahan Co., 179 Ind. 509.....                | 489      |
| — v. Ross, 169 Ind. 3.....                                            | 323              | Richards v. Wilson, 185 Ind. 335.....                     | 500      |
| — v. State, 178 Ind. 498.....                                         | 23               | Richmond Light, etc., Co. v. Rau, 184 Ind. 117.....       | 325, 328 |
| — v. Yundt, 78 Ind. 373.....                                          | 124              | Richwine v. Presbyterian Church, etc., 135 Ind. 80.....   | 490      |
| Porter v. Midland R. Co., 125 Ind. 476.....                           | 404, 407, 412    | Ridgway v. Ludlow, 58 Ind. 248.....                       | 653      |
| Post, Admr., v. Losey, 111 Ind. 74.....                               | 670              | Riggs v. State, 104 Ind. 261.....                         | 455      |
| Potter v. McCormack, 127 Ind. 439.....                                | 500              | Rigrish v. State, 178 Ind. 470.....                       | 16, 17   |
| Potts v. Pardee, 220 N. Y. 431.....                                   | 348              | Ritchey v. State, 7 Blackf. 168.....                      | 480      |
| Powers v. State, 80 Ind. 77.....                                      | 34               | Robards v. State, 152 Ind. 294.....                       | 24       |
| — v. World's Fair Mining Co., 10 Ariz. 5.....                         | 236              | Robb v. State, 144 Ind. 569.....                          | 384      |
| Pratt v. Luther, 45 Ind. 250.....                                     | 226, 227         | Robertson v. Ford, 164 Ind. 538.....                      | 611      |
| Prest-O-Lite Co. v. Skeel, 182 Ind. 593.....                          | 531              | Robinson v. State, 152 Ind. 304.....                      | 25       |
| Price v. Hallett, 138 Mo. 561.....                                    | 217              | Rock v. State, 185 Ind. 51.....                           | 602      |
| — v. State, (Ind. App.), 118 N. E. 690.....                           | 75               | Rock Oil Co. v. Brumbaugh, 59 Ind. App. 640.....          | 326      |
| — v. —, 44 Tex. Cr. R. 304.....                                       | 273              | Rodgers v. Pittsburgh, etc., R. Co., 255 Pa. St. 462..... | 236      |
| Producers Oil Co. v. Hanzen, 238 U. S. 325.....                       | 656              | Rogers v. Shewmaker, 27 Ind. App. 631.....                | 221      |
| Prudential Ins. Co. v. Godfrey, 75 N. J. Eq. 484.....                 | 160              | Rose v. City of Jeffersonville, 185 Ind. 577.....         | 269      |
| — v. Ritchey, 188 Ind. 157.....                                       | 425              | — v. State, 171 Ind. 662.....                             | 24       |
| — v. Young, 14 Ind. App. 560.....                                     | 160              | Rosenthal v. Rambo, 165 Ind. 584.....                     | 636, 664 |
| Public Savings Ins. Co. v. Greenwald, (Ind. App.), 118 N. E. 556..... | 73               | Ross v. Faust, 54 Ind. 471.....                           | 652, 653 |
| Railroad Co. v. County of Otoe, 16 Wall. 667.....                     | 261              | — v. Illinois Glass Co., 64 Ind. App. 166.....            | 25       |
| Railway Co. v. Schneider, 45 Ohio St. 678.....                        | 123              | Rotch's Wharf Co. v. Judd, 108 Mass. 224.....             | 411      |
| Rast v. Van Deman, etc., Co., 240 U. S. 342.....                      | 177, 178, 182    | Rothschild v. Leonhard, 33 Ind. App. 452.....             | 491      |
| Reemelin v. Mosby, 47 Ohio St. 570.....                               | 366              | — v. State, 7 Tex. App. 519.....                          | 307      |
| Regadanz v. State, 171 Ind. 387.....                                  | 17, 22, 363, 466 | Rothschild & Co. v. Steger Piano Co., 256 Ill. 196.....   | 179      |
| Reilly v. Connable, 214 N. Y. 586.....                                | 143              | Rowe v. Peabody, 102 Ind. 198.....                        | 501      |
| Reitz v. Hodgins, 185 Ind. 168.....                                   | 269              | Royse v. Turnbaugh, 117 Ind. 539.....                     | 670      |

|                                                                    |            |
|--------------------------------------------------------------------|------------|
| Rush v. Foos Mfg. Co., 20 Ind. App. 515.....                       | 503        |
| Ryman v. Crawford, 86 Ind. 262.....                                | 129        |
| St. Louis v. Handlan, 242 Mo. 88.....                              | 590        |
| St. Louis, etc., Railway v. Gill, 156 U. S. 649.....               | 101        |
| St. Louis, etc., R. Co. v. Craft, 237 U. S. 648.....               | 429        |
| Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148....             | 334        |
| Sanitary District v. Loughran, 160 Ill. 362.....                   | 350        |
| Sansberry v. Hughes, 174 Ind. 638.....                             | 604        |
| Saunders v. Mills, 6 Bing. 213.....                                | 560        |
| Schaffner v. Voss, 46 Ind. App. 551.....                           | 491        |
| Schless v. Grand Rapids, 131 Mich. 52.....                         | 694        |
| Schmitt, Supt., v. F. W. Cook Brewing Co., 187 Ind. 623.....       | 582        |
| Schneider v. State, 181 Ind. 218.....                              | 186, 187   |
| Schoemaker v. —, 179 Ind. 248.....                                 | 23         |
| Schondel v. —, 174 Ind. 734.....                                   | 16         |
| School District No. 1 v. Dauchy, 25 Conn. 530....                  | 210        |
| Schoonover v. Reed, 65 Ind. 313.....                               | 169        |
| Schulte v. Louisville, etc., R. Co., 128 Ky. 627.....              | 123        |
| Schwartz v. Saunders, 46 Ill. 18.....                              | 210        |
| Scudder v. State, 62 Ind. 13.....                                  | 150        |
| Seaboard Air Line v. Seegers, 207 U. S. 73.....                    | 473        |
| Seaboard Air Line Ry. v. Railroad Commission, 206 Fed. 181.....    | 95         |
| Sebienske v. Downey, 47 Ind. App. 214.....                         | 438        |
| Second Employers' Liability Cases, 223 U. S. 1.....                | 421        |
| Selby v. State, 161 Ind. 667.....                                  | 291        |
| Sell v. Keiser, 49 Ind. App. 101.....                              | 313        |
| Shaffer v. State, 100 Ind. 365.....                                | 67         |
| Sharpe v. Baker, 51 Ind. App. 547.....                             | 682        |
| Shattuck v. State, 11 Ind. 473.....                                | 304        |
| Shaw v. Merchants Nat. Bank, 60 Ind. 83.....                       | 500        |
| Shears v. State, 147 Ind. 51.....                                  | 245        |
| Sherman v. Clear View Orchard Co., 74 Ore. 240....                 | 552        |
| Sherrick v. State, 167 Ind. 345.....                               | 453, 455   |
| Shields v. Pyles, 180 Ind. 71.....                                 | 29         |
| Shira v. State, ex rel., 187 Ind. 441.....                         | 73         |
| Shordan v. Kyler, 87 Ind. 38.....                                  | 663        |
| Shores-Mueller Co. v. Best (Ind. App.), 118 N. E. 688.....         | 73         |
| Shular v. State, 160 Ind. 300.....                                 | 187, 533   |
| Siegel v. Eaton, etc., Co., 165 Ill. 550.....                      | 210        |
| Sizer v. City of Logansport, 151 Ind. 626.....                     | 653        |
| Skelton v. State, 173 Ind. 462.....                                | 297        |
| Smith v. Burns, 71 Ore. 133.....                                   | 143        |
| — v. Cleveland, etc., R. Co. (Ind. App.), 117 N. E. 534.....       | 25         |
| — v. Hess, 91 Ind. 424.....                                        | 67, 69     |
| — v. People, 25 Ill. 9.....                                        | 152        |
| — v. State, 93 Ind. 67.....                                        | 150, 288   |
| — v. —, 85 Ind. 553.....                                           | 274        |
| — v. State, ex rel., 140 Ind. 343.....                             | 500        |
| Smurr v. State, 88 Ind. 504.....                                   | 383        |
| Smyth v. Ames, 169 U. S. 466.....                                  | 95, 96, 98 |
| Solimeto v. State, 188 Ind. 170.....                               | 332        |
| Soules v. Robinson, 158 Ind. 97.....                               | 30         |
| South Bend, etc., Gas Co. v. Jensen, 182 Ind. 557.....             | 436        |
| Southern Indiana R. Co. v. Railroad Comm., etc., 172 Ind. 113..... | 201        |
| Southern Product Co. v. Franklin Coil Hoop Co., 183 Ind. 123.....  | 467        |
| Spencer v. Robbins, 106 Ind. 580.....                              | 245        |
| Sperry, etc., Co. v. State, 188 Ind. 173.....                      | 723        |
| Sphung v. Moore, 120 Ind. 352.....                                 | 653        |
| Sprigg v. Bank of Mount Pleasant, 39 U. S. (14 Pet.) 201.....      | 668        |
| Start v. Clegg, 83 Ind. 78....                                     | 407        |

|                                                    |                                                                |
|----------------------------------------------------|----------------------------------------------------------------|
| State v. Ardoin, 51 La. Ann.<br>169.....180        | State v. Reed, 168 Ind. 588.274                                |
| — v. Balsley, 159 Ind. 395<br>.....456, 457        | — v. Reese, 69 Wash. 437.357                                   |
| — v. Bates, 148 Ind. 610..303                      | — v. Richcreek, 167 Ind.<br>217.....258                        |
| — v. Bragdon, 136 Minn.<br>348.....270             | — v. Rickey, 10 N. J. Law<br>97.....299                        |
| — v. Carroll, 38 Conn. 449<br>.....372             | — v. Rubertone, 89 N. J.<br>Law 285 .....272                   |
| — v. Chenoweth, 163 Ind.<br>94.....24              | — v. Sarlin, 188 Ind. 359<br>.....466, 506, 511, 512, 581      |
| — v. Chicago, etc., R. Co.,<br>239 Mo. 196.....95  | — v. Seeger, 65 Kan. 711.506                                   |
| — v. Comer, 157 Ind. 611<br>.....301, 503          | — v. Shadrout, 89 Vt. 520.506                                  |
| — v. Cooper, 96 Ind. 331..301                      | — v. Simpson, 166 Ind. 211<br>.....595                         |
| — v. Cunningham, 25<br>Conn. 195 .....356          | — v. Slocum, 111 Minn.<br>328.....305                          |
| — v. Drake, 125 Ind. 367.504                       | — v. Smith, 173 Ind. 388. 70                                   |
| — v. Easter, 80 Ohio St.<br>542.....299            | — v. —, 18 S. D. 341...273                                     |
| — v. Eden, 92 Wash. 1...610                        | — v. —, 95 Wash. 271..270                                      |
| — v. Feagans, 148 Ind.<br>621.....297              | — v. Stimson, 24 N. J.<br>Law 1 .....453                       |
| — v. Fisk, 170 Ind. 166... 19                      | State v. Stout, 112 Ind. 245<br>.....363, 466                  |
| — v. Gainos, 53 Mont. 118<br>.....270, 275         | — v. Terre Haute Brew-<br>ing Co., 186 Ind. 248.....608        |
| — v. Grant, 86 Iowa 216..296                       | — v. Tinkler, 72 Kan. 262<br>.....270                          |
| — v. Hamlin, 47 Conn. 95.299                       | — v. Tucker, 75 Conn. 201<br>.....685                          |
| — v. Hassett, 64 Vt. 46...358                      | — v. Tiesburg Land Co.,<br>61 Ind. App. 555.....               |
| — v. Hatfield, 87 N. J.<br>Law 124 .....506        | .....657, 658, 659                                             |
| — v. Healy, 136 Minn. 264<br>.....275              | — v. Watson, 95 Mo. 411. 69                                    |
| — v. Hilberg, 22 Utah 27.273                       | — v. White, 44 Kan. 514..278                                   |
| — v. Hockett, 129 Mo.<br>App. 639.....70           | — v. Williams, 43 Wash.<br>505.....273                         |
| — v. Hurd, 101 Iowa 391.272                        | — v. Williamson, 22 Utah<br>248 .....273, 278                  |
| — v. Hyman, 98 Md. 596..261                        | — v. Winstandley, 155<br>Ind. 290.....156, 453, 455            |
| — v. Jones, 185 Ind. 234.. 34                      | — v. —, 154 Ind. 443..                                         |
| — v. Kelley, 191 Mo. 680..273                      | .....156, 453, 454, 455                                        |
| — v. Lindley, 14 Ind. 430.275                      | — v. —, 151 Ind. 495..                                         |
| — v. McDonald, 106 Ind.<br>233.....595             | .....384, 386                                                  |
| — v. McIntyre, 139 N. C.<br>599.....609            | State, ex rel. v. Bailey, 106<br>Minn. 138 .....872            |
| — v. McKinstry, 50 Ind.<br>465.....152             | — v. Billheimer, 178 Ind.<br>83.....367                        |
| — v. Madden, 170 Iowa<br>230.....297               | — v. Board, etc., 170 Ind.<br>595 .....255, 257                |
| — v. Morrison, 46 Mont.<br>84.....278              | — v. Ellis, 184 Ind. 307..302                                  |
| — v. Osborn, 155 Ind. 385.582                      | — v. Graham, 183 Ind. 53.691                                   |
| — v. Paris, 179 Ind. 446<br>.....362, 511          | — v. Hyde, 129 Ind. 296..368                                   |
| — v. Pooler, 105 Me. 224.372                       | — v. Irvine, 206 U. S. 278. 51                                 |
| — v. Portsmouth Savings<br>Bank, 106 Ind. 435..... | — v. —, 14 Wyo. 318... 51                                      |
| .....653, 658, 659                                 | — v. McClelland, 138 Ind.<br>395.....261                       |
| — v. Ray, 50 Iowa 520... 69                        | — v. Morgan's, etc.,<br>Steamship Co., 111 La. 120<br>.....238 |

|                                                                        |                                                                      |
|------------------------------------------------------------------------|----------------------------------------------------------------------|
| State, ex rel. v. Sperry, etc.,<br>Co., 110 Minn. 378.....177          | Torphy v. State, 188 Ind. 30. 716                                    |
| — v. Superior Court, 17<br>Wash. 12 .....366                           | — v. —, 187 Ind. 73....685                                           |
| — v. Tomlinson, 16 Ind.<br>App. 662.....160                            | Town of Windfall City v.<br>State, ex rel., 174 Ind. 311<br>.....267 |
| — v. Vandalia R. Co., 183<br>Ind. 49 ..... 92                          | Town of Woodruff Place v.<br>Gorman, 179 Ind. 1.....695              |
| Stenglein v. Saginaw Circuit<br>Judge, 128 Mich. 440.....367           | Townsend v. State, 147 Ind.<br>624.....261                           |
| Stewart v. Gwynn, 41 Ind.<br>App. 320.....160                          | Tracewell, Admr., v. Farns-<br>ley, 104 Ind. 497.....488             |
| — v. State, 113 Ind. 505..494                                          | Trentman v. Fletcher, 100<br>Ind. 105 .....669                       |
| Stipp v. State, 187 Ind. 211<br>.....298, 503                          | Tull v. State, ex rel., 99 Ind.<br>238.....302                       |
| Stone v. Elliott, 182 Ind. 454<br>..... 30                             | Turpin v. State, 80 Ind. 148.389                                     |
| — v. Farmers' Loan, etc.,<br>Co., 116 U. S. 307..... 95                | Union Associated Press v.<br>Heath, 49 App. Div. 247..559            |
| Stoner v. Rice, 121 Ind. 51..<br>.....652, 654, 655, 656, 658          | Union Frat. League v. Swee-<br>ney, 184 Ind. 378....164, 166         |
| Stout v. Humphrey, 69 N. J.<br>Law 436 .....552                        | Union Nat. Bank v. Finley,<br>180 Ind. 470.....467                   |
| — v. State, 90 Ind. 1....470                                           | Union Pacific R. Co. v.<br>Henry, 36 Kan. 565.....124                |
| Stremmel v. Gaar, etc., Co.,<br>176 Ind. 600..... 24                   | United States v. Cook, 17<br>Wall. 174 .....154                      |
| Stuart v. Elk Horn Bank,<br>etc., Co., 123 Ark. 285....617             | — v. Cruikshank, 92 U. S.<br>542.....154                             |
| — v. State, 35 Tex. Cr. 440<br>.....306                                | — v. Edgerton, 80 Fed.<br>374.....307                                |
| Stucker v. State, 171 Ind.<br>441 .....382, 495                        | — v. Heinze, 177 Fed. 770<br>.....307                                |
| Summers v. Hutson, 48 Ind.<br>228.....692                              | — v. Mills, 7 Pet. 142....154                                        |
| Sweeny v. Old Colony, etc.,<br>R. Co., 10 Allen (Mass.)<br>368.....124 | — v. Northway, 120 U. S.<br>327.....454                              |
| Tanner v. Little, 240 U. S.<br>369.....178                             | — v. Philadelphia, etc., R.<br>Co., 221 Fed. 683.....307             |
| Taylor v. Schradsky, 178<br>Ind. 217 .....331                          | — v. Rubin, 218 Fed. 245.307                                         |
| Terre Haute Brewing Co. v.<br>State, 169 Ind. 242.....297              | — v. Wilson, 46 Fed. 748. 69                                         |
| Thain v. State, 182 Ind. 345<br>.....271                               | Urtz v. New York, etc., R.<br>Co., 202 N. Y. 170.....441             |
| Thomas v. Ohio Coal Co., 199<br>Ill. App. 50 .....410                  | Utterback v. State, 153 Ind.<br>545..... 24                          |
| — v. State, 103 Ind. 419..602                                          | Valparaiso Lighting Co. v.<br>Tyler, 177 Ind. 278.....325            |
| — v. Winchester, 6 N. Y.<br>397..... 86                                | Vancleave v. State, 150 Ind.<br>273.....244                          |
| Thompson v. Norton, 14 Ind.<br>187.....407                             | Vandalia Coal Co. v. Coak-<br>ley, 184 Ind. 661.....439              |
| — v. Ryan, 183 Ind. 232..346                                           | Vandalia R. Co. v. Yeager,<br>60 Ind. App. 118.....404               |
| Tolleston Club, etc. v.<br>Clough, 146 Ind. 93.....652                 | Vandibur v. Love, 10 Ind. 54<br>.....489                             |
| — v. Lindgren, 39 Ind.<br>App. 448 .....658, 659                       | Van Spanje v. Hostettler<br>(Ind. App.), 119 N. E. 725<br>.....391   |
| — v. State, 141 Ind. 197..<br>.....652, 658, 659                       | Vinnedge v. State, 167 Ind.<br>415.....156, 454, 455                 |

|                                                                          |                                                                             |
|--------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| Vivian Collieries Co. v. Cahall, 184 Ind. 473.....                       | West Muncie Strawboard Co. v. Slack, 164 Ind. 21.....                       |
| .....323, 325, 459                                                       | Western Assurance Co. v. Koontz, 17 Ind. App. 54...164                      |
| Vulcan Iron, etc., Co. v. Electro, etc., Min. Co., 54 Ind. App. 28 ..... | Western Union Tel. Co. v. Braxtan, 165 Ind. 165....259                      |
| .....425                                                                 | Wheeler v. State, 158 Ind. 687.....717                                      |
| Wabash R. Co. v. McNown, 53 Ind. App. 116....118, 123                    | Wheeling, etc., R. Co. v. Public Util. Comm., 96 Ohio 370.....337           |
| — v. Priddy, 179 Ind. 483.446                                            | Whisler v. Whisler, 162 Ind. 136.....344                                    |
| Wade v. State, 71 Ind. 535..                                             | Wichitaw, etc., R. Co. v. Fechheimer, 12 Pac. Rep. 362.....405              |
| .....279, 280, 281                                                       | Willey v. Fractional School Dist., 25 Mich. 419.....694                     |
| Waggoner v. State, 155 Ind. 341.....291                                  | Willard v. Red Bank Oil Co., 151 Ill. App. 433.....568                      |
| Wagner v. Wagner, 183 Ind. 528.....340                                   | Willcox v. Consolidated Gas Co., 212 U. S. 19.....576                       |
| Waldon v. State, 182 Ind. 112.....271                                    | Williams v. Chicago, etc., R. Co., 135 Ill. 491.....138                     |
| Walker v. State, 136 Ind. 663.....20                                     | — v. Pittsburgh, etc., R. Co. (Ind. App.), 120 N. E. 46.....73              |
| Wall v. State, 51 Ind. 453..                                             | — v. State, 169 Ind. 384..266                                               |
| .....456, 457                                                            | Wilson v. Hoffman, 54 Mich. 246.....655                                     |
| Wallace v. Goodall, 18 N. H. 439.....410                                 | — v. Kester, 59 Ind. App. 471.....24                                        |
| Walton v. Horkan, 112 Ga. 814.....631                                    | — v. State, 24 Conn. 57... ..274                                            |
| — v. State, 88 Ind. 9.....                                               | — v. —, 70 Miss. 595...307                                                  |
| .....718, 721                                                            | — v. Tevis, 184 Ind. 712..350                                               |
| Wantland v. State, 145 Ind. 38.....471                                   | Winegardner v. State, 181 Ind. 525 .....                                    |
| Ward v. David, 3 Sandf. (N. Y. Super.) 502.....238                       | .....389                                                                    |
| — v. State, 188 Ind. 606..621                                            | Winnemucca Water, etc., Co. v. Model Gas Engine Works, 179 Ind. 542.....670 |
| — v. —, 179 Ind. 524...267                                               | Winship v. Clendenning, 24 Ind. 439 .....                                   |
| Warren v. First Nat. Bank, 149 Ill. 9.....631                            | .....407                                                                    |
| Waterbury v. Miller, 13 Ind. App. 197.....216                            | Winterbottom v. Wright, 10 M. & W. 109.....84                               |
| Watts v. Watts, 176 Ind. 334 .....                                       | Wood v. Ridgeville College, 114 Ind. 320.....664                            |
| .....78                                                                  | — v. State, 92 Ind. 269...302                                               |
| Weaver v. People, 33 Mich. 296.....69                                    | — v. Vandalia R. Co., 231 U. S. 1.....97, 98, 99                            |
| — v. State, 154 Ind. 1....                                               | Woodring v. McCaslin, 182 Ind. 134 .....                                    |
| .....35, 716                                                             | .....29                                                                     |
| — v. —, 83 Ind. 289...386                                                | Woodruff v. State, 72 Neb. 815.....273                                      |
| — v. —, 8 Ind. 410....595                                                | Woodsmall v. State, 179 Ind. 697.....23, 150, 288                           |
| Webb v. John Hancock, etc., Ins. Co., 162 Ind. 616....220                | Woodward v. Mathews, 15 Ind. 339 .....                                      |
| Weed Sewing Machine Co. v. Winchel, 107 Ind. 260....                     | .....664                                                                    |
| .....668, 670                                                            | — v. Miller, 119 Ga. 618..86                                                |
| Weir Plow Co. v. Walmsley, 110 Ind. 242.....668, 670                     |                                                                             |
| West Chicago Park Comrs. v. Farber, 171 Ill. 146....590                  |                                                                             |
| West Leigh Colliery Co. v. Tunnicliffe, 10 Ann. Cas. 74.....412          |                                                                             |



|                                         |               |                                          |     |
|-----------------------------------------|---------------|------------------------------------------|-----|
| Woodward v. State, 174 Ind.<br>743..... | 267, 383      | Yorn v. Bracken, 153 Ind.<br>492.....    | 438 |
| Wright v. House, 188 Ind.<br>247.....   | 589, 590      | Yost v. Yost, 141 Ind. 584...            | 78  |
| — v. State, 168 Ind. 643<br>.....       | 156, 454, 455 | Young v. Older, 183 Ind. 646<br>.....    | 466 |
| Yazel v. State, 170 Ind. 535<br>.....   | 23, 362, 511  | Zimmerman v. Judah, 13<br>Ind. 286 ..... | 665 |

# STATUTES CITED AND CONSTRUED

|                                         |                    |
|-----------------------------------------|--------------------|
| Constitution U. S., 14th Amendment..... | 178                |
| 12 Stat. at L. 503.....                 | 51                 |
| 24 Stat. at L. 440.....                 | 44                 |
| 26 Stat. at L. 417.....                 | 52                 |
| 34 Stat. at L. 63.....                  | 45                 |
| 34 Stat. at L. 1281.....                | 52                 |
| §§ 8871-8876 U. S. Comp. St. 1916.....  | 52                 |
| §8877 U. S. Comp. St. 1916.....         | 52                 |
| §8878 U. S. Comp. St. 1916.....         | 44                 |
| §8891 U. S. Comp. St. 1916.....         | 45                 |
| Constitution, Art. 1, §1.....           | 176                |
| Constitution, Art. 1, §12.....          | 257                |
| Constitution, Art. 1, §13.....          | 153                |
| Constitution, Art. 1, §16.....          | 481                |
| Constitution, Art. 1, §19.....          | 18                 |
| Constitution, Art. 1, §21.....          | 258                |
| Constitution, Art. 4, §19.....          | 258, 582, 604, 605 |
| Constitution, Art. 4, §22.....          | 259                |
| Constitution, Art. 10, §1.....          | 258                |
| §8356a Burns' Supp. 1918.....           | 607, 620           |
| §8356d Burns' Supp. 1918.....           | 360, 464, 505, 604 |
| §237 Burns 1914.....                    | 150                |
| §343a Burns 1914.....                   | 324                |
| §344 Burns 1914.....                    | 58, 161, 165, 420  |
| §362 Burns 1914.....                    | 117, 135           |
| §408 Burns 1914.....                    | 490                |
| §420 Burns 1914.....                    | 716                |
| §661 Burns 1914.....                    | 327, 328           |
| §700 Burns 1914.....                    | 164, 166, 424      |
| §1044 Burns 1914.....                   | 63                 |
| §1405 Burns 1914.....                   | 215                |
| §1461 Burns 1914.....                   | 23                 |
| §1674 Burns 1914.....                   | 298                |
| §1965 Burns 1914.....                   | 298                |
| §1980 Burns 1914.....                   | 300, 302           |
| §2040 Burns 1914.....                   | 17                 |
| §2058 Burns 1914.....                   | 455                |
| §2062 Burns 1914.....                   | 288, 458           |
| §2063 Burns 1914.....                   | 288                |
| §2065 Burns 1914.....                   | 288, 364           |
| §2072 Burns 1914.....                   | 386                |
| §2073 Burns 1914.....                   | 66, 67             |
| §2089 Burns 1914.....                   | 33, 34, 35, 716    |
| §2091 Burns 1914.....                   | 267                |
| §2137 Burns 1914.....                   | 392                |
| §2158 Burns 1914.....                   | 269                |
| §2163 Burns 1914.....                   | 24, 494            |
| §2165 Burns 1914.....                   | 386                |
| §2166 Burns 1914.....                   | 66                 |
| §2171 Burns 1914.....                   | 66                 |
| §2174 Burns 1914.....                   | 66                 |
| §2176 Burns 1914.....                   | 66                 |

|                              |                         |
|------------------------------|-------------------------|
| §2239 Burns 1914.....        | 375                     |
| §2240 Burns 1914.....        | 381, 382, 385           |
| §2242 Burns 1914.....        | 382                     |
| §2250 Burns 1914.....        | 388, 532                |
| §2260 Burns 1914.....        | 478, 480, 715           |
| §2273 Burns 1914.....        | 71                      |
| §2294 Burns 1914.....        | 155, 454                |
| §2295 Burns 1914.....        | 450, 451, 452           |
| §2378 Burns 1914.....        | 287, 296                |
| §2425 Burns 1914.....        | 593                     |
| §2647 Burns 1914.....        | 150, 287, 715           |
| §2875 Burns 1914.....        | 310                     |
| §3037 Burns 1914.....        | 312, 314                |
| §3052 Burns 1914.....        | 312, 313                |
| §3066 Burns 1914.....        | 710                     |
| §3101 Burns 1914.....        | 681                     |
| §3210 Burns 1914.....        | 40                      |
| §3213 Burns 1914.....        | 41                      |
| §3273a Burns 1914.....       | 47                      |
| §3920b-3920h Burns 1914..... | 473                     |
| §4004 Burns 1914.....        | 677, 678, 679, 680, 681 |
| §4005 Burns 1914.....        | 677, 678, 679, 680, 681 |
| §4438 Burns 1914.....        | 672                     |
| §4438a Burns 1914.....       | 672                     |
| §5431 Burns 1914.....        | 133                     |
| §5533 Burns 1914.....        | 90                      |
| §5533f Burns 1914.....       | 136                     |
| §5536 Burns 1914.....        | 200, 343                |
| §5550 Burns 1914.....        | 90                      |
| §6141 Burns 1914.....        | 351                     |
| §6141-6143 Burns 1914.....   | 27                      |
| §6142 Burns 1914.....        | 398                     |
| §6143 Burns 1914.....        | 353, 394, 399           |
| §6144 Burns 1914.....        | 207                     |
| §6151 Burns 1914.....        | 350                     |
| §6174 Burns 1914.....        | 27, 29                  |
| §6449 Burns 1914.....        | 58, 59                  |
| §6451 Burns 1914.....        | 58, 59                  |
| §6864 Burns 1914.....        | 46                      |
| §6866a Burns 1914.....       | 47                      |
| §7463 Burns 1914.....        | 549                     |
| §7471a Burns 1914.....       | 613, 614                |
| §7471c Burns 1914.....       | 614                     |
| §7479 Burns 1914.....        | 614                     |
| §7483 Burns 1914.....        | 614                     |
| §7713 Burns 1914.....        | 9                       |
| §7717 Burns 1914.....        | 9                       |
| §7718 Burns 1914.....        | 12                      |
| §7719 Burns 1914.....        | 12                      |
| §7890 Burns 1914.....        | 366                     |
| §8020b Burns 1914.....       | 323                     |
| §8351 Burns 1914.....        | 16, 22, 31, 468         |
| §8711 Burns 1914.....        | 639, 692                |
| §8711-8725 Burns 1914.....   | 630                     |
| §8748 Burns 1914.....        | 588                     |
| §8756 Burns 1914.....        | 591                     |
| §8760 Burns 1914.....        | 591                     |
| §8762 Burns 1914.....        | 591                     |
| §8989 Burns 1914.....        | 225                     |
| §9406 Burns 1914.....        | 302                     |

# STATUTES CITED AND CONSTRUED. xxiii

|                                  |               |
|----------------------------------|---------------|
| \$9711 Burns 1914.....           | 333           |
| \$9926h Burns 1914.....          | 355           |
| \$10052a Burns 1914.....         | 340, 344      |
| \$10052c3 Burns 1914.....        | 575           |
| \$10052v2 Burns 1914.....        | 578           |
| \$10143e Burns 1914.....         | 702, 703      |
| \$10143g Burns 1914.....         | 702           |
| \$10344 Burns 1914.....          | 256           |
| \$10476c Burns 1914.....         | 186, 375      |
| \$2250 Burns 1908.....           | 266, 273      |
| \$4327-4333 Burns 1901.....      | 227           |
| \$5590 Burns 1901.....           | 82            |
| \$6166a Burns 1901.....          | 41            |
| \$237 R. S. 1881.....            | 150           |
| \$399 R. S. 1881.....            | 490           |
| \$658 R. S. 1881.....            | 154, 166, 424 |
| \$1009 R. S. 1881.....           | 63            |
| \$1393 R. S. 1881.....           | 298           |
| \$1668 R. S. 1881.....           | 304           |
| \$1927 R. S. 1881.....           | 480           |
| \$2358 R. S. 1881.....           | 310           |
| \$2499 R. S. 1881.....           | 312           |
| \$2508 R. S. 1881.....           | 312           |
| \$2519 R. S. 1881.....           | 710           |
| \$3311 R. S. 1881.....           | 227           |
| \$4020 R. S. 1881.....           | 133, 614      |
| \$4924 R. S. 1881.....           | 614           |
| \$5864 R. S. 1881.....           | 302           |
| 1 R. S. 1852 p. 471.....         | 657           |
| 1 R. S. 1852 p. 482.....         | 225, 227      |
| \$25 R. S. 1843.....             | 480           |
| Local Laws 1848 p. 176.....      | 237           |
| \$285 R. L. Minn. 1905.....      | 305           |
| \$1780 Fla. Comp. Laws 1914..... | 306           |
| \$3856 Fla. Comp. Laws 1914..... | 306           |
| Laws of Wash. 1915 p. 2.....     | 609, 610      |
| Acts 1873 p. 218.....            | 225           |
| Acts 1881 p. 571.....            | 368, 369      |
| Acts 1881 p. 708.....            | 227           |
| Acts 1889 p. 273.....            | 40            |
| Acts 1891 p. 29.....             | 303, 368, 369 |
| Acts 1891 p. 402.....            | 480           |
| Acts 1893 p. 16.....             | 716           |
| Acts 1895 p. 171.....            | 41            |
| Acts 1895 p. 205.....            | 681           |
| Acts 1899 p. 58.....             | 117, 135      |
| Acts 1899 p. 109.....            | 677           |
| Acts 1899 p. 170.....            | 82            |
| Acts 1901 p. 92.....             | 41            |
| Acts 1901 p. 448.....            | 58, 59        |
| Acts 1901 p. 516.....            | 366, 367, 369 |
| Acts 1901 p. 590.....            | 215           |
| Acts 1903 p. 49.....             | 256           |
| Acts 1905 p. 83.....             | 90, 92, 93    |
| Acts 1905 p. 142.....            | 46            |
| Acts 1905 p. 219.....            | 225, 227      |
| Acts 1905 p. 236.....            | 639           |
| Acts 1905 p. 521.....            | 9, 12         |

# xxiv STATUTES CITED AND CONSTRUED.

|                             |                                                                                                                                           |
|-----------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| Acts 1905 p. 584.....       | 17, 24, 33, 34, 35, 66, 71, 150, 267,<br>269, 287, 288, 298, 300, 364, 375, 381, 382, 386, 392,<br>450, 453, 455, 478, 494, 593, 715, 716 |
| Acts 1905 p. 631.....       | 34                                                                                                                                        |
| Acts 1907 p. 14.....        | 155, 454                                                                                                                                  |
| Acts 1907 p. 85.....        | 266, 273, 388                                                                                                                             |
| Acts 1907 pp. 167, 550..... | 630                                                                                                                                       |
| Acts 1907 p. 183.....       | 41                                                                                                                                        |
| Acts 1907 p. 447.....       | 66                                                                                                                                        |
| Acts 1907 p. 454.....       | 90, 92, 93                                                                                                                                |
| Acts 1907 p. 508.....       | 27, 207, 350, 351, 394, 398                                                                                                               |
| Acts 1907 p. 689.....       | 16, 22, 31, 468                                                                                                                           |
| Acts 1909 p. 122.....       | 613                                                                                                                                       |
| Acts 1909 p. 173.....       | 58                                                                                                                                        |
| Acts 1909 p. 323.....       | 136                                                                                                                                       |
| Acts 1909 p. 358.....       | 333                                                                                                                                       |
| Acts 1909 p. 359.....       | 227                                                                                                                                       |
| Acts 1909 p. 403.....       | 46                                                                                                                                        |
| Acts 1909 p. 412.....       | 630, 692                                                                                                                                  |
| Acts 1911 p. 71.....        | 227                                                                                                                                       |
| Acts 1911 p. 80.....        | 42                                                                                                                                        |
| Acts 1911 p. 145.....       | 322                                                                                                                                       |
| Acts 1911 p. 193.....       | 327                                                                                                                                       |
| Acts 1911 p. 415.....       | 58, 161, 165, 420                                                                                                                         |
| Acts 1911 p. 454.....       | 473                                                                                                                                       |
| Acts 1911 p. 566.....       | 588, 591                                                                                                                                  |
| Acts 1913 p. 79.....        | 702                                                                                                                                       |
| Acts 1913 p. 167.....       | 340, 341, 342, 344, 345, 575, 578                                                                                                         |
| Acts 1913 p. 267.....       | 532                                                                                                                                       |
| Acts 1913 p. 290.....       | 672                                                                                                                                       |
| Acts 1913 pp. 333-338.....  | 47                                                                                                                                        |
| Acts 1913 p. 505.....       | 38, 39                                                                                                                                    |
| Acts 1913 p. 515.....       | 53                                                                                                                                        |
| Acts 1913 p. 572.....       | 54                                                                                                                                        |
| Acts 1913 p. 638.....       | 549                                                                                                                                       |
| Acts 1913 p. 660.....       | 355                                                                                                                                       |
| Acts 1913 p. 779.....       | 186, 375                                                                                                                                  |
| Acts 1913 p. 820.....       | 200, 343                                                                                                                                  |
| Acts 1913 p. 850.....       | 324                                                                                                                                       |
| Acts 1913 pp. 920-927.....  | 47                                                                                                                                        |
| Acts 1915 p. 123.....       | 17, 153                                                                                                                                   |
| Acts 1915 p. 349.....       | 370                                                                                                                                       |
| Acts 1915 p. 674.....       | 174, 723                                                                                                                                  |
| Acts 1917 p. 15.....        | 354, 360, 361, 363, 464, 493, 505, 511,<br>581, 604, 607, 608, 609, 610, 611, 620                                                         |
| Acts 1917 p. 118.....       | 343                                                                                                                                       |
| Acts 1917 p. 253.....       | 251, 255, 256, 258                                                                                                                        |
| Acts 1917 p. 523.....       | 171, 332                                                                                                                                  |
| Acts 1917 p. 688.....       | 298                                                                                                                                       |

# TEXT-BOOKS CITED

|                                                             |                                                                            |
|-------------------------------------------------------------|----------------------------------------------------------------------------|
| 25 Am. and Eng. Ency. Law<br>(2d ed.) 314..... 69           | 3 Kent Commentaries 124... 669                                             |
| 2 Am. Lead. Cases 262..... 667                              | 2 Lewis' Sutherland, Statu-<br>tory Construction (2d ed.)<br>§367..... 608 |
| Archbold, Crim. Pl. (1st Am.<br>ed.) 23 ..... 453           | Moore, Crim. Law 712..... 292                                              |
| Beale and Wyman, Railroad<br>Rate Reg. (3d ed.) §675... 446 | Odgers, Libel and Slander<br>257..... 559                                  |
| 2 Bishop, Crim. Law §209... 293                             | 1 Page and Jones, Taxation<br>by Assessment §239..... 255                  |
| Bishop, New Crim. Proc. (2d<br>ed.) §586 ..... 363          | Pomeroy, Eq. Jurisp. (3d<br>ed.) §1288 ..... 630                           |
| 4 Blackstone, Commentaries<br>..... 375                     | 6 R. C. L. 84, §83..... 180                                                |
| Blackstone, Commentaries<br>Complete 995 ..... 63           | 6 R. C. L. 136, §136..... 261                                              |
| 1 Bouvier, Law Dictionary<br>(Rawle's 3rd ed.) 621... 292   | 8 R. C. L. 198..... 271                                                    |
| Burge, Suretyship 115, 116. 667                             | 12 R. C. L. 248..... 438                                                   |
| Chitty, Contracts 529..... 667                              | 12 R. C. L. 1022..... 299                                                  |
| 16 C. J. 608..... 271                                       | 12 R. C. L. 1030..... 299                                                  |
| 17 C. J. 213-215..... 383                                   | Reeder, Validity of Rate<br>Regulations 230-238..... 95                    |
| 17 C. J. 286..... 457                                       | 1 Sedgwick, Damages (9th<br>ed.) §70 ..... 410                             |
| Clark, Crim. Proc. 113..... 307                             | Thompson and Merriam, Ju-<br>ries §533 ..... 299                           |
| — 286..... 456                                              | — §632..... 304                                                            |
| 16 Col. Law Review 158... 307                               | — §634..... 307                                                            |
| Cooley, Torts (3d ed.) 247... 568                           | Townshend, Slander and Li-<br>bel, §§115, 116..... 559                     |
| 20 Cyc 1300..... 299                                        | Underhill, Crim. Ev. (2d<br>ed.) §238 ..... 390                            |
| 33 Cyc 764..... 135                                         | 1 Wharton, Criminal Law<br>(11th ed.) §397..... 20                         |
| 33 Cyc 1481..... 272                                        | — §741..... 278                                                            |
| Elliott, App. Proc. §487... 314                             | 2 Wharton, Crim. Law<br>§1396..... 293                                     |
| — §709..... 385                                             | 2 Wharton, Crim. Law (9th<br>ed.) §1398 ..... 722                          |
| 2 Elliott, Contracts §1538..<br>..... 235, 236              | 2 Wharton, Crim. Proc.<br>(10th ed.) §1295..... 307                        |
| 3 Elliott, Railroads (2d ed.)<br>§1157..... 124             | Wharton, Negligence (2d<br>ed.) §438 ..... 83                              |
| 4 Ency. Pl. and Pr. 716... 293                              | Wood, Nuisances §856..... 405                                              |
| Gillett, Crim. Law §310... 292                              | 2 Wood, Railway Law 1328. 123                                              |
| — §873..... 470                                             | 2 Wyman, Public Ser. Corp.<br>§§1255, 1256, 1260..... 446                  |
| 1 Greenleaf, Evidence (15th<br>ed.) §111 ..... 718          |                                                                            |
| 2 High, Injunctions (4th<br>ed.) §1315 ..... 367            |                                                                            |
| 2 Hutchinson, Carriers (3rd<br>ed.) §1042 ..... 446         |                                                                            |
| Joyce, Indictments §85... 299                               |                                                                            |
| 2 Joyce, Injunctions §1380.. 367                            |                                                                            |

JUDGES  
OF THE  
SUPREME COURT  
OF THE  
STATE OF INDIANA

DURING THE PERIOD COMPRISED IN THIS VOLUME

---

HON. LAWSON M. HARVEY.\*§§  
HON. MOSES B. LAIRY.\*\*¶  
HON. HOWARD L. TOWNSEND.§¶¶  
HON. BENJAMIN M. WILLOUGHBY.‡  
HON. DAVID A. MYERS.§§  
HON. JOHN W. SPENCER.†

\* Chief Justice, November Term, 1918.

\*\* Chief Justice, May Term, 1919.

§ Chief Justice, November Term, 1919.

† Elected in 1912.

¶ Elected in 1914.

§§ Elected in 1916.

¶¶ Appointed in 1917, and elected in 1918.

‡ Elected in 1918.

**OFFICERS**  
**OF THE**  
**SUPREME COURT**

**ATTORNEY-GENERAL,  
ELE STANSBURY**

**REPORTER,  
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**CLERK,  
PATRICK J. LYNCH**

**SHERIFF,  
GEORGE D. ABRAHAM**

**LIBRARIAN,  
CHARLES E. EDWARDS**





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## **In Memoriam**

---

### **LEANDER J. MONKS**

Leander J. Monks was born in Winchester, Indiana, July 10, 1843, and died in Indianapolis, April 19, 1919. He was the son of George W. and Mary A. Monks. His father came to Randolph county, Indiana, from Ohio a few years after the organization of the State of Indiana. He was a pioneer in Indiana, a prominent and useful citizen, and did his full part in developing and building up the county. Judge Monks made Winchester his home throughout his entire life, although during the later years he spent the greater part of the time in Indianapolis, where his official, professional and business relations required his presence. The foundation of his splendid educational accomplishments was laid in the public schools of Indiana and by an attendance of three years at Indiana University. Judge Monks belonged to a family of Methodists and throughout his life affiliated with, and took an active interest in, the work and purposes of the Methodist Episcopal Church. On August 3, 1865, he and Lizzie W. White were married. To this union were born four children. His home life was ideal in every way.

Judge Monks was a member of the Sigma Chi college fraternity and of the Columbia and Marion clubs of Indianapolis. He was a member, also, of the Independent Order of Odd Fellows and of the Masonic fraternity, attaining in the latter order the thirty-second degree rank. Throughout his life Judge Monks was a wide reader of the best in history, economics, poetry and fiction. He was a man of broad and real culture and

## LEANDER J. MONKS.

possessed an extensive and valuable fund of general information. His private library of general literature was one of the best in Indiana. Prior to his judicial career he took an active interest in each successive political campaign in every capacity, except as a public speaker, being chairman of the Randolph County Republican Committee and also a member of the State Central Committee and the State Executive Committee of his party.

Judge Monks commenced the practice of law at Winchester in 1865. He soon took a prominent place in his profession and was recognized as a capable, industrious and skilful lawyer. In 1878 he was elected Judge of the Twenty-fifth Judicial Circuit, then composed of Randolph and Delaware counties. He was re-elected to that position in 1884 and 1890, at the latter date the circuit consisting of Randolph county alone. He was elected a judge of the Supreme Court of Indiana in 1894 and re-elected in 1900 and 1906. He was renominated in 1912, but at the election he was defeated with his party. Prior to his election to the circuit bench he practiced law successively with Colonel M. B. Miller and Hon. E. L. Watson, both now deceased, and with Judge W. A. Thompson, now judge of the Delaware Circuit Court. Soon after retiring from the Supreme Bench he opened a law office in Indianapolis in partnership with John F. Robbins, Harry Starr and James P. Goodrich, now Governor of Indiana. Later the firm was dissolved and Judge Monks continued the practice of law in Indianapolis without any partnership relation until his death.

Judge Monks, although a prominent public man in Indiana for many years, was not a public speaker. As a counselor in guiding and directing those who were trial lawyers in the discharge of their duties as such, he was a master. As a consequence great trial lawyers

## LEANDER J. MONKS.

sought his counsel and guidance in the courtroom. By the public Judge Monks was best known and will be longest remembered for what he did in his judicial capacity. We think of him first as a lawyer and judge. Rarely does it come to a lawyer to spend as many years on the bench as did Judge Monks.

With such a career it need hardly be here declared that he was an able and most industrious lawyer. In forty-one volumes of the decisions of the Supreme Court of Indiana lies the permanent record of his exposition of the law as applied to a great variety of important subjects. No word of ours can add to or affect that magnificent memorial. As a member of the highest court in his state his reputation as a judge is much broader than his state. His work placed him in the front ranks of the foremost thinkers and workers in his chosen profession. His mind was singularly alert and his memory of precedents remarkable. He worked with almost incredible rapidity both as a trial and appellate judge. His opinions written while a member of the Supreme Court bear evidence of an exhaustive examination of the authorities and indicate the great talents and profound knowledge that he possessed. His opinions were clear and concise and contained the most lucid statements of the law. They were exhaustive without being verbose and will ever remain "a pillar of cloud by day and pillar of fire by night" to men of his profession who may follow in his luminous footsteps. Lawyers and judges both within and without the state turn to his opinions with a feeling of confidence that thereby they will be safely guided to a just solution of any legal problem confronting them. As a judge he was so well versed in the fundamental principles of the law that he was naturally a conservative. He believed in the Constitution and in the fundamental and long-established principles of the law. He believed in or-

## LEANDER J. MONKS.

derly development—in leading down slowly from precedent to precedent. He kept constantly before his mind the principle that stability and orderly development and progress in a state are the things most to be desired. He believed that the law should be so declared and adhered to by the courts that every person could safely rely thereon in his personal conduct and business transactions. He realized fully that men in all relations of life should be able safely to act on the law as declared by the courts of appellate jurisdiction in carrying out their various transactions. He believed that the doctrines announced by the courts of appeal should not be departed from except in the presence of a necessity growing out of a substantial error in a former opinion. He recognized very vividly that a material change in the law throws into confusion business and other matters entered into on the faith of former decisions. He therefore believed that the widest possible scope should be given to the principle of *stare decisis*. He liked the law. It was his master. He delighted in it. Always was he ready to discuss legal principles and their application. No scientist ever loved his science more than Judge Monks loved the law.

Happy the state that has no servants but such as he. The influence of his work as a lawyer and judge and the example of his life as a private and public citizen will in themselves be a very real and most splendid immortality. It may be said of him as of the Shepherd King of old, "He served his day and generation well, and fell asleep."

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The above memorial presented by George H. Batchelor, secretary of Indiana State Bar Association, is accepted and ordered filed and spread on the records of the Supreme Court.

March 19, 1920.

TOWNSEND, C. J.

---

## JOHN H. GILLETT

With sadness and solemnity, we are called upon as lawyers to record the passing to the Unseen of our beloved friend and neighbor, John H. Gillett. No practitioner in this part of the state has attained a higher standing as a lawyer, a jurist, a citizen, a husband and friend than he.

Born in New York State on September 18, 1860, and coming to Indiana when a mere boy, Judge Gillett combined the traditions and experiences of the East with the rugged and vigorous life of the Middle West. The son of an eminent lawyer and jurist, he was constantly in the atmosphere of his chosen profession, and his admission to the bar at the age of twenty-one was but a natural and easy step. After six years in general practice, including service as city attorney of the city of Valparaiso, he became Deputy Attorney-General of Indiana, in 1887, in which capacity he served for four years with great credit to himself and his state. He found time, notwithstanding the arduous duties of his service in this office, to prepare the text of his widely used work on Criminal Law. He came to Hammond in 1891, at the close of his second term as Deputy Attorney-General, to engage in the general practice of law. On July 2, 1892, he was appointed circuit judge, and served in that capacity with the highest degree of acceptability until January 25, 1902, when he was chosen by the Governor of Indiana, to become a member of the Supreme Court. This appointment was approvingly acclaimed throughout the state as a recognition of the exceptional merit and qualifications of the

## JOHN H. GILLETT.

appointee. At the next general election he was elected for a full term of six years, and his opinions rendered during that time are considered by all lawyers as evidencing a profound knowledge of the law, and classic as to diction, showing a clear conception of the controversy, stated in such clear and unambiguous terms that the layman could read and understand. After his retirement from the bench, he returned to Hammond, and resumed the practice of his chosen profession, taking at once a foremost place at the bar, and continued in active practice up to a very short time before his death.

Of his capacity as a lawyer and thinker, not only judges and lawyers, but all who knew him, alike bear witness. Never given to frivolity, but always, even though serious, possessed of a sunny disposition, he surrounded himself with lasting friendships. At the beginning of his chosen life's work, he was imbued with the idea of proficiency, and by close application and industry seldom equaled, and very rarely excelled, he had developed a mentality which analyzed the most intricate legal problems, leaving them clear and understandable. He was not only a great man intellectually, but morally and spiritually, though always humble and unostentatious. His home life and thoughtful devotion to his life companion were singularly inspiring.

To borrow the language he used within recent months in paying tribute to one of his life-long friends and professional associates, "His leave-taking caused poignant regret, particularly to those associated with him in professional life." It is with a sense of real loss in the passing of John H. Gillett that the undersigned submit this tribute to his memory, as the report of the committee of the Lake County Bar Association, that the same may be spread of record by the secretary of this association, and that a copy thereof be spread on the

JOHN H. GILLETT.

order books of the courts of Lake county, and filed with the Supreme Court of Indiana; that a copy be sent to his son and sister.

V. S. REITER,  
L. L. BOMBERGER,  
D. E. BOONE,  
*Committee.*

---

This memorial accepted and ordered spread of record.

March 30, 1920.

TOWNSEND, C. J.

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CASES DECIDED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1918, AND MAY  
AND NOVEMBER TERMS, 1919, IN THE ONE HUN-  
DRED SECOND, ONE HUNDRED THIRD AND ONE  
HUNDRED FOURTH YEARS OF THE STATE.

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WHITESELL ET AL. v. METSKER ET AL.

[No. 23,072. Filed June 18, 1918. Rehearing denied  
December 17, 1918.]

1. **APPEAL.**—*Subsequent Appeals.—Questions to be Decided.*—In a subsequent appeal, only those propositions are to be considered that are not foreclosed as the law of the case by the former opinion. p. 3.
2. **HIGHWAYS.**—*Proceedings for Improvement.—Disqualification of Commissioner.—Subsequent Appeals.—Law of the Case.*—Where the Supreme Court, in an appeal in a highway proceeding, held that the trial court erred in failing to consider a proper challenge of the competency of a commissioner and stated the rule of law that a commissioner, though disqualified, may be compelled to vote where his refusal to do so “would effectually bar any remedy,” in a subsequent appeal therein, where the findings showed that, though one of the commissioners was disqualified at the time of the first appeal and remained so, his associate commissioners disagreed on the approval of the viewers’ report, such rule was the law of the case and validated the vote of such commissioner on the approval order, his vote on other questions depending upon the particular circumstances. p. 4.
3. **HIGHWAYS.**—*Improvement Proceedings.—Qualification of Commissioner.—Challenge.—Appeal.*—Where, in a highway proceeding, the board of commissioners made no finding on a



challenge of a member of the board for disqualification, but received his vote and unanimously affirmed the viewers' report, they either overruled the challenge or declined to act thereon, and in either case an issue was made thereon and a right created that was presentable on appeal to the circuit court. p. 5.

4. TRIAL.—*Findings of Fact.—Necessity of Conclusions of Law.*—Where the trial court, in a highway proceeding, stated a conclusion of law that one of the commissioners, challenged because of interest, was disqualified, but found facts showing a necessity for his vote on a question in the proceeding, it should have stated a conclusion that the vote was justified. pp. 6, 7.
5. HIGHWAYS.—*Improvement.—Appeal to Circuit Court.—Jurisdiction.*—On appeal to the circuit court in a highway proceeding, only such issues as were tried before the board of commissioners can be tried in the circuit court; hence a conclusion of law upon a matter that was not before the commissioner is of no force. pp. 6, 7.
6. HIGHWAYS.—*Petition for Improvement.—Viewers' Report.—Variance.*—Where the petition for the improvement of a highway, under §7713 Burns 1914, Acts 1905 p. 521, recommended a pavement of broken stone, combined and held together with a durable binder, a recommendation of the viewers, on advice of the engineer, of cement as a binder was within the statute, since the statute is silent as to the binding material, and, under §7717 Burns 1914, Acts 1905 p. 521, the commissioners had power to approve the viewers' report if they deemed the changes essential to proper construction. pp. 7, 9, 10.
7. TRIAL.—*Findings.—Conclusion.*—The statement in the court's findings in a highway proceeding that the "method of construction, the pavement provided for, and the materials to be used as specified in said last report \* \* \* are materially, substantially and radically different from the kind \* \* \* prayed for" in the original petition, is a mere conclusion having no force as a fact. p. 8.
8. HIGHWAYS.—*Improvement.—Power of Commissioners.*—Though the commissioners on recommendation may not order an entirely different character of road from that petitioned for, they may, within the bounds of fair judgment and engineering needs, if the petition is granted, order that the road shall be constructed according to approved methods. p. 11.
9. HIGHWAYS.—*Improvements.—Viewers' Supplemental Report.—Presumption.*—Where the viewers' report in a highway proceeding stood for three months without action, and no objections were made, it will be presumed that there was no occasion for the filing of a supplemental report as required under §7718 Burns 1914, Acts 1905 p. 521. p. 12.

10. **HIGHWAYS.**—*Improvement Proceedings.—Objections.—Burden of Proof.*—In a highway proceeding, under §7713 *et seq.* Burns 1914, Acts 1905 p. 521, parties objecting to the jurisdiction of the board of commissioners had the burden of proving facts showing its lack of power to proceed. p. 13.

From the Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Proceeding for the establishment of a highway by William J. Whitesell, administrator, and others, against Hamilton Metsker and others. From a judgment setting aside an order of the board of commissioners directing the improvement and remanding the cause to the board for further action, the petitioners appeal. *Reversed.*

*William V. Rooker*, for appellants.

*J. F. Neal*, *N. C. Neal* and *Shirts & Fertig*, for appellees.

**PER CURIAM.**—This appeal involves proceedings to establish and improve a highway leading from the south end of Tenth street, at the south corporation line of the town of Noblesville, Hamilton county, to a line drawn east and west through the center of the right of way of the Lake Erie and Western Railway, where the right of way is crossed by the Noblesville and Indianapolis free gravel road; and also involves proceedings to improve said free gravel road from said last-named point south, the aggregate length of the highways affected and described being less than three miles.

A former appeal resulted in a decision to be found in *Metsker v. Whitesell* (1913), 181 Ind. 126, 704, 103

N. E. 1078, 1085. The only propositions now

1. to be considered are those which are not foreclosed by the law of the case, as stated in said decision, and which are presented by issues made before the board of commissioners after said decision.

No questions exist as to the jurisdiction of the board of the particular subject involved in the petitions, nor of the parties.

It was, on said former appeal, asserted that the board's orders were void, not having been made by a majority of the commissioners, *if* Washington,

2. a commissioner who voted therefor was disqualified from voting and one of his associate commissioners voted for and the other voted against said orders. Said decision of this court also established the law of the case to be that, though it may be found, as a general proposition, that Washington was disqualified to vote, circumstances may be that the exception stated in said opinion should apply. Said opinion reads: "An exception to the general rule of disqualification is recognized by some courts, including this one, where the disqualification, if permitted to prevail, would destroy the only legal tribunal for the hearing of the matter in issue, and thus bar any hearing, unless the disqualified judge may be compelled to act. \* \* \* Where the tribunal, as here, consists of three persons, an interested commissioner should act only where his refusal to do so would effectually bar any remedy."

Said opinion held that the circuit court erred in not considering the challenge of Washington's competency, reversed the judgment, and directed further proceedings not inconsistent with the law of the case thus announced. This left open, not only the question as to Washington's competency, but the question whether the facts justified Washington's vote in any particular matter.

Upon a trial by the circuit court of this present appeal, facts were specially found showing that Washington was at the time of the former proceedings disqualified, and that he remained incompetent; but it was also expressly found that his associate commissioners voted,

one for and the other against the order approving the viewers' report and directing that bids be received; therefore, under the law of the case, established as above noted, the proceeding was blocked and it was necessary for Washington to vote. His vote was thus justified and said order was in this respect valid. Whether he was justified in voting on other questions depended upon the circumstances existing in each instance.

As found by the court, the issues made before the board after the cause was remanded were as follows: Petitioners filed a supplemental petition, asking that new viewers and an engineer be appointed, as one of the former viewers was deceased, the other, Stultz, was a candidate for election as commissioner (he was later elected and afterwards acted in this proceeding as a commissioner), and the term of the surveyor, who had been appointed engineer, had expired. This petition was not objected to and was granted. This was proper, and no issue was made or determined on this supplemental petition. Petitioners also filed a motion to consolidate the two proceedings relating to the respective roads described. Said motion also asked the board to determine the competency of Washington, alleging that the facts asserted as creating incompetency did not exist.

The findings show: Remonstrators renewed the challenge of the competency of Washington; that the board unanimously granted said petition; made

3. no express order or decision as to the competency of Washington; but did receive his vote, and unanimously appoint viewers and an engineer. No other objection was made to said petition, nor to the board's action thereon.

The board, by accepting Washington's vote, either overruled the challenge of Washington, or declined to

act thereon. The record is silent. Under either circumstance, an issue was made by the challenge, and a right to present the challenge on appeal to the circuit court was created.

The findings show that in December, 1914, and within thirty days, said viewers and engineer reported. The

remonstrators moved to reject the report for rea-

4. son that the board had no power or right under the law to order construction with the kind of material and in the manner recommended by the viewers. The court finds that, because the commissioners disagreed, no action was taken by the board on said report, or the objection thereto, at any meeting until that of April, 1915. That at the April meeting the report was accepted and approved; that Commissioner Stultz voted against accepting, and Commissioners Jones and Washington voted therefor. The findings show that at the May, 1915, meeting, the board, by the vote of Washington and Jones, Stultz dissenting, ordered that said roads be established and constructed without an election, and directed that the auditor advertise for bids. Whereupon this appeal was taken.

No other issues were made before the board. No other issues can be tried by the circuit court on appeal, nor presented here. *Aetna Life Ins. Co. v. Jones*

5. (1909), 173 Ind. 149, 89 N. E. 871; *George v. Amos* (1909), 173 Ind. 599, 601, 602, 90 N. E. 606; *Fisher v. Blumhardt* (1914), 182 Ind. 603, 605, 107 N. E. 466.

We thus find as to the issues before the board: (1) There was an issue whether Washington was incompetent, and, if so, whether the board could act without his vote. (2) There was no objection, hence no issue before the board or court, as to the appointment of new viewers or engineer. (3) There was no objection to the motion to consolidate, and hence no issue as to this

motion, or the order thereon. (4) An issue was formed by motion to reject the report of viewers.

The questions we are now considering are raised by exceptions to the conclusions of law. Upon these issues and the facts specially found, the court stated as

4. its first conclusion that Washington was incompetent to vote on the question of ordering the improvement without an election; but the court fails to state any conclusion as to whether it was necessary that he vote. The facts found show the necessity, and the court should have concluded that his vote was thus justified, and that so far as this is concerned the order was valid. The exception to the first conclusion should have been sustained.

The court's second conclusion was that the board was without jurisdiction to order the consolidation and construction under one contract. No issue was

5. made or tried before the board as to this proposition. No issue, therefore, was before the circuit court. This conclusion was as to a matter not in issue, and is of no force, and the exception should have been sustained.

The court's third conclusion is that the board had no jurisdiction under the law or statutes to order the road paved in the manner and with the materials

6. specified in the report. And the fourth conclusion was that the board had no jurisdiction to order the road improved in a manner materially different in method and material from the kind of improvement prayed for in the petition, and the order was therefore void.

The facts found upon which these two conclusions depend are: That the *petition* which prayed that a road be established from Noblesville to the Lake Erie and Western Railway asked that it be established as sixty feet in width. The other petition was that an

established road be improved. Both the petitions specified a pavement eighteen feet in width, and asked that the pavement be of broken stone, combined and firmly held together with a durable binder.

The *report* provided a pavement eighteen feet in width, with a five-foot earthen strip on each side; that the pavement be separated into concrete blocks eighteen feet wide and not less than twenty-five feet long; that expansion joints be provided between each two blocks, all said joints to be filled with felt or prepared paper, and the ends of the blocks, at the expansion joints, be protected by metal plates. The report detailed the treatment and proportions of screened sand, small and large hard and durable gravel, and other hard broken stone and of cement, and provided that each of such blocks, over fills of a designated depth, should be reinforced by metal mesh, and specified the thickness of the pavement.

In addition to the above specific findings showing differences between the petition and the report, the court stated as a finding of fact that: "The court finds

7. that said method of construction, the pavement provided for, and the materials to be used as specified in said last report of viewers and engineer are materially, substantially and radically different from the kind of road or pavement and methods of construction prayed for in said original petitions, which were never amended so as to ask for any other improvement, method of construction or material to be used." The quotation above, except the statement therein that the petitions "were never amended so as to ask for any other improvement, method of construction or material to be used" is a mere conclusion, and of no force as a fact.

The facts found in comparing the petition and the

report on this point show no such difference between the petition and the report as to justify the

6. court's third and fourth conclusions of law, above stated; or, to state the matter in another way, the facts found show differences which may properly exist when in the judgment of the viewers and engineer and the board such differences are essential to a proper and durable construction of that which is petitioned for and which are within the jurisdiction of the board.

The statute does not contemplate that the petitioners shall be skilled engineers, nor that the members of the board shall be skilled engineers; and therefore provides for the appointment of a skilled engineer. The petitioners describe generally what they desire and recommend. §7713 Burns 1914, Acts 1905 p. 521, §64. That part of the petition is simply a recommendation. *Hall v. McDonald* (1908), 171 Ind. 9, 16, 85 N. E. 707. The viewers, advised by an engineer, describe specifically what is proper and necessary in the construction of a road of the character covered by the general description in the petition. This is an engineering proposition, and practically necessary, as the report is the specification upon which bids are invited. §7717 Burns 1914, Acts 1905 p. 521, §68. It is for the board to finally accept or reject the recommendations of the viewers and engineer.

In this proceeding the petition asked that the broken stone be "combined and firmly held together with a durable binder." This court determined in *Metsker v. Whitesell, supra*, in speaking of the petitions and roads here in controversy, that: "It is manifest that the legislature had a purpose in view in providing for the use of 'combinations' of stone and gravel, and it is scarcely to be doubted that such purpose was to prevent, or mitigate," disintegration, "and, in securing such result,



to permit the gravel or broken stone, or both, to be more closely united by binding with coal tar, cement, or other substance adapted to such purpose. As the statute is silent on the subject of binding material, we cannot say that the use of asphalt, for such purpose, would be unlawful, even if it were conceded that its use might entail unnecessary expense. \* \* \* We hold that under either act, a binder may be used, to form a closer union of stone or gravel, and the question of what is the most suitable material is one for the determination of the local authorities." Such is the law of this case.

Therefore in this proceeding it was adjudicated that some kind of a binder may be ordered. To apply the language of said adjudication, "as the statute is

6. silent on the subject of binding material, we cannot say that the use of cement and of" metal plates and triangular metal mesh "for such purpose would be unlawful." This statute provides for combinations of gravel and broken stone. The order here is within the statute. The statute contemplates, according to said decision, a binder of "cement or other substance." The order here is within the statute and the decision; and the petition requests a binder.

The statute names no criterion for determining whether cement, as a binder, shall be poured over broken stone and gravel placed on the roadbed and allowed to trickle to needed points for contact, or whether the cement, as a binder, shall be thoroughly mixed with the broken stone and gravel before the same is placed on the roadbed. The statute names no criterion for determining whether the one will construct a bound road, or the other a concrete road. The statute, for that matter, defines no difference between roads constructed by the two methods above mentioned; the statute does not say that the jurisdiction of the board to construct

a road of broken stone and gravel bound by cement shall cease and end if the board orders the cement used as specified in the report here considered. Therefore neither the circuit court nor this court can say within the statute that the road ordered is so far different from that petitioned for as to destroy jurisdiction of either the board or the court to make the order.

To advise the board is the engineer's special duty for which he is especially qualified. The duty of the board is to provide a durable pavement, and thus

8. economize for those who pay. We are not to be understood as holding that the viewers and engineer can recommend, and the board order, an entirely different character of road from that petitioned for, but we do hold that within the bounds of fair and good judgment and engineering needs, the board may, if it grants the petition, order that the road petitioned for shall be constructed after approved methods, and under the guidance of engineering and common experience. We hold that the difference between the petition, the report and the order, shown by the facts specially found, are not such as to justify conclusions Nos. 3 and 4. The exceptions thereto should have been sustained.

The court's fifth conclusion is that the board had no jurisdiction to order said road constructed under said last report, for that it was not shown, so as to enable this court to find, that the proper steps were taken to give the board jurisdiction to make such order, and therefore the circuit court has no jurisdiction to make any order for such improvements. We assume that this conclusion does not refer to a lack of showing of proper steps to give the board jurisdiction of the petition and proceedings thereunder. The petition was lawful. The three and only contestants voluntarily appeared, and have urged their resistance for over seven years, and at

their request the proceeding has been by this court and by two circuit courts remanded to the board for further proceedings.

The reference may be to steps taken before the board, or by the board, as to the last report of the viewers, alleged to recommend matters so far beyond the scope of the petition that the board's approval thereof was beyond its jurisdiction. We have found that the board had jurisdiction of the cause and the parties, and therefore on appeal the circuit court had jurisdiction. We have also determined that the character of the road ordered was within the board's jurisdiction.

The fifth conclusion may refer to lack of jurisdiction because there was no supplemental report as to damages. The court found as a fact that it does not

9. appear from the record of the board that the viewers and engineer made a supplemental report as to claims for damages, or as to persons under disability who may be damaged by the taking of their land. §7718 Burns 1914, Acts 1905 p. 521, §69, provides in effect that the viewer's report, when filed, shall stand for ten days, and the viewers shall assess such damages; any one dissatisfied may except to the supplemental report. Section 7719, *supra*, provides that after all matters of damages have been determined, the board shall examine and act on the report as to construction. The court did not find that any claims for damages were filed, or that the land of any infants or others under disability were taken or affected adversely. The report stood without action thereon for over three months. The appellees did not object to action thereon by the board in the absence of a supplemental report as to damages. The appellees, so far as appears, filed no claims for damages. It will, under such circumstances, be presumed that no person or party was ad-

versely affected as to damages, and that there was no occasion for a supplemental report. *Metsker v. Whitesell, supra*, 144.

The objectors were appellants in the circuit court, and the burden rested on them to produce evidence of facts destroying the board's power to proceed—

10. an issue raised by the objectors. *Heath v. Sheetz* (1905), 164 Ind. 665, 668, 74 N. E. 505.

Under these circumstances the absence of a finding as to a supplemental report does not justify a conclusion that the board had no jurisdiction to proceed. The exception to the fifth conclusion should have been sustained.

The final conclusion is that the judgment of the court should be in favor of the remonstrators for their costs, and that the cause should be remanded to the board for proceedings in accord with the mandate in *Metsker v. Whitesell, supra*, and with the judgment of the circuit court. The direction that the board proceed according to the said mandate of this court is not material, for the reason that all proceedings must be consistent with said mandate. In view of our determination that the circuit court was in error in each of its other conclusions, the mandate that the board proceed in accord therewith was erroneous. The exception to this conclusion should have been sustained.

In view of the conclusions we have reached herein, no ruling need be made on other questions presented by appellants.

The judgment of the circuit court is reversed, and the cause remanded, with instructions that the court restate its conclusions of law in accord with this opinion, remand the cause to the board of commissioners, with mandate that the board proceed in accord with its final order, that the auditor advertise for bids under the report of the viewers and engineer. Judgment against

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Scherer v. State—188 Ind. 14.

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the remonstrators for costs of this appeal and costs of last appeal to the circuit court.

Lairy J. not participating.

NOTE.—Reported in 119 N. E. 865. Subsequent appeal, law of the case, 34 L. R. A. 321. See under (5) 37 Cyc 136.

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SCHERER v. STATE OF INDIANA.

[No. 23,362. Filed January 3, 1919.]

1. INDICTMENT AND INFORMATION.—*Sufficiency.—Keeping Place for Unlawful Sale of Intoxicating Liquor.—Surplusage.*—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689, a motion to quash the affidavit because it contained a recital that the building was not licensed, and therefore did not specifically show that the defendant was not licensed, was properly overruled, where, by eliminating such recital, an offense was charged substantially in the language of the statute, since there could be no doubt as to the crime charged, the recital being meaningless surplusage in view of the fact that no law provides for licensing a building for the sale of intoxicating liquors. p. 16.
2. INTOXICATING LIQUORS. — *Indictment.—Sufficiency.—Negative Defenses.*—In charging the offense of keeping, running and operating a place for the sale of intoxicating liquors in violation of §8351 Burns 1914, Acts 1907 p. 689, it is not necessary to negative the provisos in the statute. p. 16.
3. INDICTMENT AND INFORMATION.—*Sufficiency.—Pleading Facts.—Intoxicating Liquors.*—An affidavit, under §8351 Burns 1914, Acts 1907 p. 689, which contains in plain and concise language, without unnecessary repetition, a statement of the ultimate facts that the state must prove, is sufficient, as the state is not required to plead the evidence supporting such facts. p. 17.
4. INDICTMENT AND INFORMATION.—*Sufficiency.—Pleading.—Conclusions.—Intoxicating Liquors.*—Under §8351 Burns 1914, Acts 1907 p. 689, an affidavit charging an offense substantially in the language of the statute is sufficient as against a motion to make the affidavit more specific, notwithstanding the provisions of Acts 1915, ch. 62, p. 123. p. 17.
5. CRIMINAL LAW.—*Instructions.—Reasonable Doubt.—Harmless Error.*—An instruction on reasonable doubt, which required the jury to consider the evidence as a whole, and stated that “acts when considered apart from all other evidence may appear

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Scherer v. State—188 Ind. 14.

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- innocent, but when considered with other evidence may import guilt," objected to as an invasion of the province of the jury, is subject to criticism, in that the same consideration may import innocence as well as guilt, but the instruction, considered as a whole, is *held* harmless. p. 18.
6. CRIMINAL LAW.—*Instruction.—Province of Jury.—Invasion.*—Article 1, §19, of the Constitution, giving the jury the right to determine the law and the facts in criminal cases, does not deprive the trial court of the right to advise the jury as to the law applicable. p. 18.
7. CRIMINAL LAW.—*Proof.—Material and Incidental Facts.—Reasonable Doubt.*—Ultimate or material facts are those essential in charging an offense and must be proved beyond a reasonable doubt; while incidental or subordinate facts need not be so proved. p. 18.
8. CRIMINAL LAW.—*Trial.—Instruction.—Sufficiency.—Reasonable Doubt.*—Instructions on reasonable doubt, though not containing all the definitions on the subject, were sufficient, where, considered together, they told the jury that, if it could reconcile evidence upon any reasonable hypothesis consistent with the defendant's innocence, it was its duty to do so. p. 19.
9. CRIMINAL LAW.—*Evidence.—Reputation.—Instructions.*—An instruction relative to the purpose of evidence of the defendant's reputation for morality which precluded a consideration of such evidence for any purpose other than in connection with the rest of the evidence, in determining the defendant's guilt or innocence, was erroneous, in view of the evidence and punishment assessed. p. 19.
10. CRIMINAL LAW.—*Trial.—Evidence.—Instructions.—Province of Jury.*—An instruction that, by constitutional provision, the jury was the judge of the law and facts, and that undertook to explain the jury's duty within the meaning of the constitutional provision and to admonish as to the law's safeguards to society, is *held* not objectionable as an invasion of the province of the jury. p. 21.

From Hamilton Circuit Court; *James M. Purvis*, Judge.

Prosecution by the State of Indiana against C. B. Scherer. From a judgment of conviction, the defendant appeals. *Reversed.*

*Floyd G. Christian, Ira W. Christian, and Ralph H. Waltz*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

MYERS, J.—Appellant was charged by affidavit, tried and convicted by a jury in the court below, with keeping, running and operating a place where intoxicating liquors were sold, in violation of §8351 Burns 1914, Acts 1907 p. 689.

Appellant has appealed to this court and insists: (1) That the trial court erred in overruling his motion to quash the affidavit. In support of this claim, he

1. makes the point that the affidavit does not specifically show that he was not licensed to sell liquor as provided by law. As a basis for this
2. insistence our attention is called to the recital “not then and there having a license to sell intoxicating liquor,” which he claims refers to the building as not being licensed, and not to him. In this appellant’s contention is correct. That the affidavit so charges is plainly obvious. It is also true that there was no law in this state authorizing the issuance of a license to a building or to a place for the sale of intoxicating liquor. Appellant has not claimed, nor do we believe he will claim, that by reason of the ineffectual and inconsequential recital in question he was deceived or was in doubt as to the charge made against him. Had the pleader alleged that appellant did not then and there have a license to sell intoxicating liquors, he would have negatived the provisos in the statute. *Schondel v. State* (1910), 174 Ind. 734, 93 N. E. 67. But, considering the affidavit as we find it, the provisos were not negatived, nor was it necessary to do so in charging the offense of keeping, running and operating a place where intoxicating liquors are sold, bartered and given away in violation of law. *Rigrish v. State* (1912), 178 Ind. 470, 99 N. E. 786. By eliminating the meaning-

less and surplus words from the affidavit, it then charges appellant with the offense aforesaid practically in the language of the statute, and is sufficient under the rulings of this court to withstand a motion to quash. *Donovan v. State* (1907), 170 Ind. 123, 83 N. E. 744; *Regadanz v. State* (1908), 171 Ind. 387, 86 N. E. 449; *Rigrish v. State*, *supra*.

Appellant also assigns as error: (2) The overruling of his motion to make the affidavit more specific. Under this specification he argues that he was entitled to the facts upon which the pleader based his conclusion that appellant "did then and there unlawfully keep, run and operate a place where intoxicating liquors were then and there sold, bartered and given away in violation of the laws of the State of Indiana."

"A statement of the facts constituting the offense in plain and concise language without unnecessary repetition" is the rule in criminal pleading. §2040

3. Burns 1914, Acts 1905 p. 584, §169; *Brunaugh v. State* (1909), 173 Ind. 483, 90 N. E. 1019. The affidavit before us, as to the particulars ques-

4. tioned, is the statement of ultimate facts which the state, in order to convict, must prove. The effect of appellant's insistence would require the pleader to state the evidence upon which he relies to sustain these facts. This is not the law. *Brunaugh v. State*, *supra*. The rule for which appellant contends would also contravene the well-settled rule that an offense, as here, may be charged in the language of the statute. From these observations we conclude that this is not a case where the remedy given by statute (Acts 1915 p. 123) applies.

Appellant has assigned error on the overruling of his motion for a new trial. Under this assignment he ques-



tions (1) instructions Nos. 2, 6, 8 and 9 given by the court to the jury on its own motion.

As to instruction No. 2, he insists that it invades the province of the jury and imposes restrictions and limitations upon the jury in weighing the evidence

5. and in determining the probative forces of facts and circumstances. This instruction reads as follows: "While it is necessary that every essential element of the crime charged against the defendant should be proved by the evidence beyond a reasonable doubt, this does not mean that all the incidental or subsidiary facts should be proved beyond a reasonable doubt. Evidence is not to be considered in fragmentary parts, and as each fact or circumstance stood apart from the others, but the entire evidence is to be considered. Acts when considered apart from all other evidence may appear innocent, but when considered with other evidence may import guilt."

This instruction is subject to criticism, in that the same consideration referred to in the last part of this instruction may import innocence as well as guilt; however, considering the instructions as a whole, we are persuaded that this instruction, for this reason, was not harmful to appellant.

It is true the Constitution of this state, Art. 1, §19, gives the jury in criminal cases the right to determine the law and the facts, but this constitutional provision

6. does not take away from the trial court the right to advise the jury as to the law applicable to such cases. The ultimate or material

7. facts are those essential in charging the offense, and must be proved at the trial; while the incidental or subordinate facts mentioned in the instruction are those that are evidential. As to these two classes this court has uniformly held that the first must be proved beyond a reasonable doubt before there can

be a conviction, and that it is unnecessary to so prove the latter. *Osburn v. State* (1904), 164 Ind. 262, 271, 73 N. E. 601; *State v. Fisk* (1907), 170 Ind. 166, 169, 83 N. E. 995; *Fritz v. State* (1912), 178 Ind. 463, 466, 99 N. E. 727. This instruction is not subject to the objections urged against it.

Appellant was not harmed by instruction No. 6. While it does not include all the definitions found in the books on the subject of reasonable doubt, yet

8. the jury was plainly told that if it could reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, it should do so, and not convict unless, upon a full consideration of all the evidence, they were satisfied of the defendant's guilt with that certainty that it would be willing to act "in the more weighty and important matters relating to your own affairs." Instruction No. 7 was also on the subject of reasonable doubt, and the two instructions when considered together, as they must be, fully informed the jury as to the certainty of guilt which must be attained in order to find appellant guilty as defined by the phrase "beyond a reasonable doubt."

Instruction No. 8 was as follows: "Witnesses

9. have been called in the trial of this cause who gave you their opinions concerning the reputation of the defendant for morality and his standing as a law-abiding citizen up to and prior to the time of this alleged crime. This evidence was not admitted to furnish the defendant with an excuse, license or defense for the crime charged in this case, if you are satisfied that he did commit this crime; for the law proposes to be fair and impartial to all, and requires that all persons, whether of good or bad reputation must obey it. These opinions are only competent for you to consider while considering all the evidence in this case, in determining the guilt or innocence of the defendant as

to the crime charged in this case; but if, after a fair and honest consideration of all the evidence in the case and these opinions, you are satisfied beyond a reasonable doubt that this defendant did commit the crime charged in the affidavit herein, then it is your duty to find him guilty as charged, regardless of his reputation and these opinions."

It will be observed that by this instruction the jury was told that the evidence relating to the defendant's character for morality and as a law-abiding citizen was "only competent" while considering all the evidence in the case, in determining his guilt or innocence. True, previous good character will not justify the commission of crime, nor will it alone avail as a defense, where, upon a consideration of all the evidence introduced at the trial, it clearly appears beyond a reasonable doubt that the defendant is guilty of the offense with which he is charged. But this is not the only purpose for which good character if found by the jury may be considered. For, as said in *Walker v. State* (1894), 136 Ind. 663, 669, 36 N. E. 356, and reaffirmed in *Hundley v. State* (1909), 173 Ind. 684, 91 N. E. 225: "Good character may always benefit a guilty defendant, for the jury may take it into consideration in fixing his punishment, and may, by reason of his character, mitigate the punishment." Under the instruction before us the jury was precluded from considering good character of the appellant for any purpose other than in connection with all of the other evidence in determining his guilt. Upon a careful consideration of the evidence in this case, and in view of the punishment assessed, we are satisfied that the instruction was not only erroneous, but harmful. 1 Wharton, Criminal Law (11th ed.) §397.

Instruction No. 9 told the jury, first, that under the Constitution of the state it was the judge of the law

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Bass v. State—188 Ind. 21.

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and the facts; secondly, it undertook to explain 10. to the jury its duty within the meaning of that provision; and thirdly, it amounted to an admonition to the jury as to the law's safeguards to society. This instruction is made up mainly from expressions taken from the reported opinions of this court and, while we cannot say that it was an improper instruction, yet, it is close to the border line of confusing the jury as to its right under the Constitution to determine the law and the facts. The objection that it invades the province of the jury and imposes restrictions and limitations upon it not warranted by the Constitution cannot be sustained.

Other questions are presented which may not arise at another trial, and we deem it unnecessary to consider them at this time. For the error in giving instruction No. 8, the judgment must be reversed, and it is so ordered with instructions to the trial court to grant a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 121 N. E. 369.

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### BASS v. STATE OF INDIANA.

[No. 23,378. Filed November 8, 1918. Rehearing denied January 10, 1919.]

1. CRIMINAL LAW.—*Motion in Arrest.*—*Motion to Quash.*—*Testing Indictment.*—An indictment is not subject to the same test by a motion in arrest as it is by a motion to quash, as a motion in arrest presents only the questions that the offense was not committed within the jurisdiction of the court, and that the indictment does not state facts sufficient to constitute a public offense. p. 22.
2. CRIMINAL LAW.—*Appeal.*—*Bill of Exceptions.*—*Time for Filing.*—Where time beyond the term is desired for the filing of a bill of exceptions containing the evidence, under §287, Acts 1905 p. 584, §2163 Burns 1914, leave therefor must be given by

the court at the time of the ruling on the motion for a new trial. p. 24.

3. CRIMINAL LAW.—*Bill of Exceptions.—Filing.—Certificate.—Record.—Discrepancy.*—Where a criminal case was terminated in the April term of court and the bill of exceptions was not filed until the September term, the record being silent as to any extension of time for the filing thereof, a recital in the judge's certificate that the bill of exceptions was tendered "within time allowed" does not show such conflict between the certificate and the order-book entry as to make the bill a part of the record, since the record discloses a failure to comply with §287, Acts 1905 p. 584, §2163 Burns 1914. pp. 24, 25.

From Delaware Circuit Court; *William A. Thompson*, Judge.

Prosecution by the State of Indiana against Frank Bass. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Ball & Needham*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

MYERS, C. J.—Appellant was indicted and convicted in the Delaware Circuit Court by a jury of keeping a place where intoxicating liquors were sold, and of being found in possession of intoxicating liquors for the purpose of sale, in violation of §1, Acts 1907 p. 689, §8351 Burns 1914.

Appellant's motion for a new trial and his motion to arrest the judgment were each overruled, and judgment was rendered on the verdict. Each of these rulings is separately assigned as error.

Appellant, to sustain his motion to arrest, cites *Barnhardt v. State* (1908), 171 Ind. 428, 86 N. E. 481, and *Regadanz v. State* (1908), 171 Ind. 387, 86 N.

1. E. 449. In both of these cases a ruling on the motion to quash was held to be erroneous. But it must be remembered that a motion to quash and a motion to arrest will not alike test the indictment.

*Woodsmall v. State* (1913), 179 Ind. 697, 102 N. E. 130; *Boos v. State* (1913), 181 Ind. 562, 105 N. E. 117. This court has held that a motion to arrest presents two questions: (1) That the offense was not committed within the jurisdiction of the court; (2) that the indictment does not state facts sufficient to constitute a public offense. *Lay v. State* (1913), 180 Ind. 1, 102 N. E. 274; *Pittsburgh, etc., R. Co. v. State* (1912), 178 Ind. 498, 99 N. E. 801. The indictment before us is clearly good as against the questions presented by the motion to arrest. It also meets the objections successfully urged against the indictment in the cases cited where the rulings on the motions to quash were considered. The motion to arrest the judgment was properly overruled. *Yazel v. State* (1908), 170 Ind. 535, 84 N. E. 972; *Schoemaker v. State* (1912), 179 Ind. 248, 100 N. E. 753; *Mercer v. State* (1912), 179 Ind. 426, 101 N. E. 484.

Appellant, in support of his motion for a new trial, relies on certain specifications which involve a consideration of the evidence. The state insists that none of these questions can be considered for the reason that the bill of exceptions containing the evidence is not in the record. This insistence is grounded upon the claim that the record shows that the case was disposed of at the April term of the Delaware Circuit Court, and, although no time was given beyond the term, the bill of exceptions was not filed until the September term of that court. The record shows that appellant's motion for a new trial was overruled July 3, 1917, but there is no order-book entry showing that time was then given for the filing of any bill of exceptions. The record further discloses that the bill of exceptions in question was filed September 25, 1917. The terms of the Delaware Circuit Court begin on the first Mondays of January, April and September. §1461 Burns 1914.

The statute on the subject now under consideration, §287, Acts 1905 p. 584, §2163 Burns 1914, provides that any decisions of the court, excepted to at the time, which are matters properly to be incorporated into the motion for a new trial, will be carried forward to the time of the ruling thereon, and may be included in the bill of exceptions to be filed at any time during the term or within such time as the court may then allow. Under this and similar statutory provisions, this court has uniformly held that where a bill of exceptions contain-

ing the evidence is to be filed after the term,

2. leave therefor must be given by the court at the time of the ruling on the motion for a new trial.

*Rose v. State* (1908), 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; *State v. Chenoweth* (1904), 163 Ind. 94, 71 N. E. 197; *Meyers v. State* (1904), 163 Ind. 345, 71 N. E. 957; *Utterback v. State* (1899), 153 Ind. 545, 55 N. E. 420; *Robards v. State* (1898), 152 Ind. 294, 53 N. E. 234; *Bennett v. Root Furniture Co.* (1911), 176 Ind. 606, 96 N. E. 708; *Klein v. State* (1901), 157 Ind. 146, 60 N. E. 1036; *Home Stove Co. v. Bishop* (1918), 67 Ind. App. —, 119 N. E. 152; *Stremmel v. Gaar, etc., Co.* (1911), 176 Ind. 600, 96 N. E. 703; *Wilson v. Kester* (1915), 59 Ind. App. 471, 109 N. E. 744.

In the present case it certainly appears that the proceedings in the circuit court were terminated at the April term, except the filing of the bill of exceptions, which was done at the September term, and it does not appear that time was allowed therefor at the April term, unless it can be said that the judge's certificate as to the correctness of the bill would warrant such inference.

Appellant takes the position that this certificate and the order-book entry showing that the bill was filed is sufficient under the decisions of this court to

3. make the bill a part of the record. In support

of this contention he cites: *Robinson v. State* (1898), 152 Ind. 304, 53 N. E. 223; *Indiana, etc., R. Co. v. Adams* (1887), 112 Ind. 302, 14 N. E. 80; *Ross v. Illinois Glass Co.* (1916), 64 Ind. App. 166, 115 N. E. 598; *Smith v. Cleveland, etc., R. Co.* (1918), 67 Ind. App. —, 117 N. E. 534. He insists that these cases control for the reason that the affirmative recitals in the certificate and the order, made at the time it was filed, conflict with the record which fails to show that time was allowed. The particular language of the certificate relied on follows: "And on the 25th day of September, 1917, and within the time allowed by the court so to do, the defendant tendered this his bill of exceptions number one, which contains the typewritten transcript of the evidence, so taken as aforesaid, and prayed that the same might be signed, sealed and made a part of the record in this cause; which is accordingly done, this 25th day of September, 1917, and the same is ordered to be certified by the clerk of this court, without copying, as a part of the record in this cause." The order book entry of September 25, 1917, has this statement: "It is therefore ordered by the court that said bill of exceptions be and the same is now filed as a part of the record in this cause."

We cannot agree that the point made by appellant is well taken. We are unable to affirm that any conflict exists between any order-book entry and the cer-

3. tificate; nor is there any discrepancy in the dates concerning the order of events between the record entries and the certificate, as existed in the cases cited by appellant. This record discloses a clear omission to comply with the statute expressly stating what shall be done in order to make a bill of exceptions containing the evidence, filed after the term, a part of the record. After a careful consideration of the statute and the rulings of this court, we conclude that the bill



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Steenburg v. Kyle—188 Ind. 26.

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of exceptions in question is no part of the record, and any questions sought to be presented depending upon the evidence cannot be considered.

No other questions are presented, and the judgment is affirmed.

NOTE.—Reported in 120 N. E. 657.

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STEENBURG ET AL. v. KYLE ET AL.

[No. 23,441. Filed January 21, 1919.]

1. DRAINS.—*Establishment.*—*Construction Along Line of Old Drain.*—The jurisdiction of proceedings to repair and enlarge an existing drain, under §§6141-6143 Burns 1914, Acts 1907 p. 508, is in the tribunal that established it. p. 28.
2. DRAINS.—*Repair.*—*Jurisdiction.*—*Conclusiveness of Judgment.*—Where a drain affecting lands in adjoining counties was established by a proceeding in the circuit court of one of the counties, and thereafter, in a proceeding in the court of the other county, a new drain was established, under §§6141-6143 Burns 1914, Acts 1907 p. 508, over practically the same drainage course, the jurisdiction of the latter court cannot be attacked, in a subsequent proceeding in the former court to repair the drain, on the ground that the proceeding establishing the new drain was in fact nothing more than a proceeding to repair the old drain, since the court ordering the new drain had general jurisdiction of the subject-matter and the judgment therein cannot be attacked collaterally. pp. 28, 30.
3. JUDGMENT.—*Collateral Attack.*—Where a judgment of a court having general jurisdiction of the subject-matter is fair on its face, it is entitled to full faith and credit by courts of co-ordinate jurisdiction in the same state until set aside by appeal or by direct proceeding. p. 29.

From Starke Circuit Court; *William C. Pentecost*, Judge.

Petition by Alfred C. Steenburg and others against William G. Kyle and others to repair a drain. From a judgment of dismissal, the petitioners appeal. *Affirmed.*

*Darrow & Rowley* and *O. W. Nichols*, for appellants,  
*M. R. Sutherland* and *R. N. Smith* for appellees.

MYERS, J.—Appellants, by petition filed in the Starke Circuit Court, on September 25, 1917, commenced this proceeding for the repair, deepening, enlarging and extending of what is known as the "Place ditch," and certain arms thereof, as authorized by §19, Acts 1907 p. 508, §6174 Burns 1914. It appears from the petition that in 1901, by order of the Starke Circuit Court, the Place ditch, including what was known as the "Blain" and "Robinson" arms were ordered and constructed, and affected lands in Starke and LaPorte counties.

The petition is questioned only by a remonstrance challenging the jurisdiction of the Starke Circuit Court over the subject-matter of the proceeding. In substance, it shows that in a certain proceeding had in the LaPorte Circuit Court, begun March 26, 1909, pursuant to §§2, 3, and 4, Acts 1907 p. 508, §§6141, 6142, 6143 Burns 1914, that court, upon petition of William G. Kyle and others, laid out and established a new ditch along the line of the Place ditch known as the "Kyle ditch," as also the "Fell" arm, formerly the "Blain" arm, and the "Chapman" arm along the line of the Robinson arm of the Place ditch; that such proceedings were had by the LaPorte Circuit Court whereby the last-named ditch and arms thereof were established and completed and assessments made for the payment of the work. Appellants' demurrer to this remonstrance was overruled, whereupon they answered by a general denial, and by affirmative matters not necessary to be here stated.

The issue thus formed was submitted to the court, trial had, facts specially found, and conclusions of law stated thereon as follows: (1) That the Starke Circuit Court "has no jurisdiction of the petition wherein

it seeks to clean out and reopen the original Place ditch from station 0 to station 425 of the main line, the Robinson arm and the Blain arm." (2) "That the petition describing and praying for a cleanout of the original Place ditch from station 0 to station 425, the Robinson arm and Blain arm, should be dismissed." The judgment was in accordance with the conclusions of law. Exceptions to the conclusions of law on the special findings of fact, and the assignment of error thereon, bring to our attention the only question involved in this appeal.

The findings, in substance, show that in a proceeding begun on April 15, 1901, what was known as the Place ditch and certain arms thereof known as the Blain and Robinson arms in Starke and LaPorte counties were established and constructed. On March 26, 1909, William G. Kyle and others commenced a proceeding in the LaPorte Circuit Court for the establishment and construction of a ditch which, as laid out and established, followed the line of the Place ditch from station 0 to station 425, and over the Blain and Robinson arms, thereafter known as the Kyle ditch, Fell and Chapman arms. Under the proceedings thus had the Kyle ditch and arms thereof were constructed according to the plans and specifications therefor, and all the lands theretofore assessed for the construction of the Place ditch were assessed to pay for the construction of the new ditch.

Appellants contend that the proceedings had in the LaPorte Circuit Court in no way affected the jurisdiction of the Starke Circuit Court over the original

1. Place ditch. It seems to us that a fair interpretation of the facts lead to the conclusion that the Place ditch was superseded by the Kyle ditch.
2. As we have seen, both ditches affected lands in Starke and LaPorte counties. The Place ditch

was completed long before the Kyle ditch proceedings were started. It is conceded that the proceedings in both courts covered practically the same course of drainage. It cannot be said that a new drain, if in fact it be a new one, cannot be established along the line of the old. This court has so held. *Clifton v. McMains* (1915), 184 Ind. 539, 111 N. E. 801; *Hauschild v. Roth* (1913), 181 Ind. 183, 104 N. E. 11. It has also held that jurisdiction over a previously constructed drain for the purposes contemplated by the provisions of §6174, *supra*, is in the tribunal establishing it. *Woodring v. McCaslin* (1914), 182 Ind. 134, 104 N. E. 759; *O'Toole v. Tudor* (1910), 175 Ind. 227, 93 N. E. 276; *Shields v. Pyles* (1913), 180 Ind. 71, 99 N. E. 742.

But under the facts disclosed by the record before us, it was the opinion of the trial court—and to which we must agree—that the Place ditch had been con-

3. sumed by the Kyle ditch, and therefore, under the rule giving to the court or tribunal jurisdiction for the purpose of §6174, *supra*, over drains constructed under its order and direction, it follows that this proceeding to repair has to do with a drain established by the judgment of the LaPorte Circuit Court. Having thus concluded, we are compelled to hold that the Starke Circuit Court is without jurisdiction to grant the relief for which appellants pray. But appellants insist that in truth and in fact the proceeding in the LaPorte Circuit Court was nothing more than a proceeding to repair and put the Place ditch in condition to properly perform the drainage for which it was designed and intended. However that may be, it was a matter which should have been presented at the proper time to the LaPorte Circuit Court. That court had jurisdiction generally over drainage proceedings. It had jurisdiction to determine the character of the proposed Kyle drain, and we must assume that it did so,

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Torphy v. State—188 Ind. 30.

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and rendered the judgment which is conceded to be fair on its face. That judgment is entitled to full faith and credit by courts of co-ordinate jurisdiction as well as by this court until set aside, either on appeal or by a direct proceeding brought in the court rendering it for that purpose. *Soules v. Robinson* (1901), 158 Ind. 97, 62 N. E. 999, 92 Am. St. 301.

Appellants do not claim that the judgment of the LaPorte Circuit Court establishing the Kyle ditch and confirming its completion has been set aside, or

2. in any manner modified so as not to include that part of the original Place ditch, which they seek to have repaired under the order of the Starke Circuit Court. As we see this record, the success of appellants' contention depends upon the sustaining of a collateral attack on a judgment not void *ab initio*. This we cannot do even though the judgment be wrong. *Stone v. Elliott* (1914), 182 Ind. 454, 476, 106 N. E. 710, and cases there cited; *Bruce v. Osgood* (1899), 154 Ind. 375, 56 N. E. 25.

Judgment affirmed.

NOTE.—Reported in 121 N. E. 537. Judgment, conclusiveness, collateral attack, 23 Cyc 1090; 23 Am. St. 104.

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### TORPHY v. STATE OF INDIANA.

[No. 23,349. Filed January 28, 1919.]

1. CRIMINAL LAW.—*Continuance.—Absent Witnesses.—Prosecutor's Admission.*—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689, the statement, in the defendant's legally sufficient affidavit for continuance, that absent witnesses would testify that no illegal sales of intoxicating liquors were made at the time alleged by the state, was the statement of a material and relevant fact, and, on the refusal of the prosecuting attorney to admit the truth thereof, it was error to refuse a continuance, in view of §2089 Burns 1914, Acts 1905 pp. 584, 631. p. 33.

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Torphy v. State—188 Ind. 30.

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2. **CRIMINAL LAW.**—*Absent Witnesses.*—*Continuance.*—*Discretion.*—Where the defendant filed a legally sufficient affidavit for a continuance, on account of the absence of witnesses, under §2089 Burns 1914, Acts 1905 pp. 584, 631, and the prosecuting attorney refused to admit all the material and relevant facts that the defendant alleged that he could prove by the absent witnesses, the court had no discretion in the matter, as the defendant was entitled to a continuance as a matter of right, a partial admission of such facts being insufficient. (*Detro v. State*, 4 Ind. 200; *Connors v. State*, 183 Ind. 618, distinguished.) p. 35.

From the Monroe Circuit Court; *Robert W. Miers*, Judge.

Prosecution by the State of Indiana against David Torphy. From a judgment of conviction, the defendant appeals. *Reversed.*

*Robert L. Mellen* and *John P. O'Donnell*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

**WILLOUGHBY, J.**—Appellant was convicted of the violation of §8351 Burns 1914, Acts 1907 p. 689, and has appealed from the judgment of the circuit court on the grounds: (1) That the court erred in refusing to grant a continuance of the cause; and (2) that appellant's motion for a new trial should have been sustained.

The latter motion contains numerous specifications, but those which are relied upon principally relate directly or indirectly to the ruling on the motion for a continuance. In his affidavit filed in support of that motion, appellant names five persons whose attendance at court on the day fixed for trial could not then be had on account of their absence from the state, and in one instance on account of severe illness.

The indictment charges appellant with unlawfully keeping, running and operating a place in Lawrence county, Indiana, where intoxicating liquors were sold,

bartered and given away in violation of the laws of the State of Indiana, and that he was then and there found unlawfully in possession of intoxicating liquor for the unlawful purpose of selling, bartering and giving away the same in violation of the laws of said state; and in his affidavit appellant says: "That the defendant herein is charged with keeping, running and operating a place in Lawrence County, Indiana, where intoxicating liquors were sold, bartered and given away in violation of the laws of the State of Indiana, the charge having been filed on the 26th day of September, 1916; that the state will claim in the trial of said cause that said defendant had charge of the Ketcham Building on Sixteenth Street in the City of Bedford at the times covered by said charge and kept intoxicating liquors therein for unlawful purposes and sold and bartered the same in violation of the law, and that numerous raids were made thereon by the officers of the City of Bedford and will have, as this affiant is informed, three witnesses who will swear that they purchased intoxicating liquors therein at such times of defendant. Deponent further says that each of said absent witnesses will testify that they have been in and about said building during the times fixed by the state almost every day during the said period and that they saw no intoxicating liquors therein so kept for illegal purposes, and that they saw no intoxicating liquors sold therein by said defendant during said period. *Said witnesses will further testify that they were in said building at the time the state's witnesses claimed to have purchased intoxicating liquors and will testify that they did so purchase intoxicating liquors of said defendant and that no such purchases were made.*"

To avoid a continuance, the prosecuting attorney admitted as true all of appellant's affidavit except that portion thereof which we have set out in italics, where-

upon the motion was overruled. Appellant now earnestly insists that where, in a criminal prosecution, the defendant files a sufficient affidavit in support of his motion for a continuance, the state must admit *all* the facts which the defendant claims he can prove by absent witnesses in order to avoid the continuance.

When the defendant has made a proper affidavit for continuance on account of the absence of witnesses, the prosecuting attorney must, if he desires to pre-

1. vent the continuance of the cause, admit the truth of the facts which the defendant in his affidavit for a continuance alleges that he can prove by the absent witnesses. §2089 Burns 1914, Acts 1905 p. 584, 631. This means that he shall admit all the material facts relevant to the issues which in his affidavit he alleges he can prove by the absent witnesses. The statement that "said witnesses will further testify that they were in said building at the time the state's witnesses claimed to have purchased intoxicating liquors and will testify that they did so purchase intoxicating liquors of said defendant and that no such purchases were made" is a statement of fact material and relevant to the issues. If no sale was made, as said statement alleges, that would be some evidence favorable to appellant tending to show his innocence of the charge upon which he was being tried. The witnesses for the state were permitted to testify that they had been in said building on numerous occasions and purchased intoxicating liquors in less quantities than a quart at a time during the period covered by the prosecution in this case. It is evident then that such statement in said affidavit that no such sales were made as testified to by the witnesses for the state was a material statement of fact which the prosecutor would be required to admit if



he desired to avoid a continuance of the cause. *Powers v. State* (1881), 80 Ind. 77.

In the case of the *State v. Jones* (1916), 185 Ind. 234, 237, 113 N. E. 755, 756, the court said: "When a continuance is sought in a criminal case on the ground of an absent witness, the statute requires that the affidavit shall state the facts to which such witness will testify and that affiant believes such facts to be true. These are material parts of the affidavit. §2089 Burns 1914, Acts 1905 p. 631. If the state desires to avoid the continuance, it must admit that the facts stated in the affidavit as the evidence of the absent witness are true. §2089 Burns 1914, *supra*. If such admission is made by the state, it cannot offer evidence to dispute such fact or to impeach the credibility of the absent witness. *Powers v. State* (1881), 80 Ind. 77."

The appellee insists that it was wholly within the discretion of the trial court to sustain appellant's motion for a continuance or to overrule it, and that such action of the court would not be error, because it would not be an abuse of the judicial discretion allowed the trial court in such cases, and cites in support of such contention *Detro v. State* (1853), 4 Ind. 200, 202; *Connors v. State* (1915), 183 Ind. 618, 622, 109 N. E. 757. These cases do not support appellee's contention. In the case of *Detro v. State*, *supra*, a motion by the defendant for continuance, on account of absent witnesses, was overruled, because the affidavit did not sufficiently state the facts which defendant expected to prove by the absent witnesses. In the case of *Connors v. State*, *supra*, the defendant prepared an affidavit and motion for continuance conforming to §2089 Burns 1914, *supra*, and the court held that a sufficient showing was made to entitle defendant to a continuance, and that the overruling of his motion was reversible error. The court said in that case: "This motion is in conformity with §2089 Burns

1914, Acts 1905 p. 584, §218. The motion for a continuance on application of the defendant in a criminal case is a matter in the sound discretion of the trial court, and its conclusion will not be disturbed unless it is shown that the court has abused its discretion. We are of the opinion that the facts set forth in the motion entitled appellant to a continuance and the court's refusal to grant the same was reversible error."

It will be observed that the decision that the court abused its discretion is based upon the fact that the affidavit for a continuance was in conformity

2. with §2089 Burns 1914, *supra*. In other words, if the defendant in his affidavit showed all that the statute required of him, no discretion of the court, no misjudgment, no misapprehension of the facts stated, could deprive him of a continuance. *Pettit v. State* (1893), 135 Ind. 393, 406, 34 N. E. 1118. Whenever a defendant brings himself within the requirements of the statute, he can demand a continuance, as a matter of right. *Weaver v. State* (1899), 154 Ind. 1, 3, 55 N. E. 858; *Morris v. State* (1886), 104 Ind. 457, 4 N. E. 148. The trial court, having held that the affidavit for a continuance was legally sufficient, was bound to grant a continuance unless the prosecuting attorney would admit the truth of *all* the material facts which the defendant in his affidavit for a continuance alleged that he could prove by the absent witnesses. This admission the prosecuting attorney refused to make, and the court, refusing to require him to do so, refused a continuance. This was error, requiring a reversal of the cause.

Judgment reversed, with instructions to the court to grant a new trial.

NOTE.—Reported in 121 N. E. 659. Witnesses, absence, grounds for continuance, generally, 122 Am. St. 745.

Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

THE INDIANA STATE BOARD OF FINANCE ET AL. v.  
STATE OF INDIANA, EX REL. TRUSTEES OF  
PURDUE UNIVERSITY.

[No. 22,994. Filed January 31, 1919.]

1. COLLEGES AND UNIVERSITIES.—*Appropriations.—Purdue.—Agricultural Extension.*—The act of 1911 (Acts 1911 p. 80), appropriating \$30,000 to Purdue University for agricultural work, like the similar acts of 1889, 1901 and 1907 that it repealed, was not passed for the maintenance of the university proper, but only constituted its officials as part of the body having charge of the expenditure of said sum in the interest of agricultural experiment work, etc.—a purpose independent as to funds and as to the extent of the work; hence, such appropriation was not terminated by the Mill Tax Act (Acts 1913 p. 505), which limited appropriations to the university to a specified amount. pp. 40, 42 43.
2. COLLEGES AND UNIVERSITIES.—*Appropriations.—Statute.—Construction.*—Though the Mill Tax Act (Acts 1913 p. 505), which limited appropriations to Purdue University, provided a larger increase for the university than the officials asked for, the act did not terminate the appropriation for agricultural extension work provided in the act of 1911 (Acts 1911 p. 80), otherwise there would be no amount *fixed* for such work and the bureau, continued by law in charge thereof, would have no fund except at the discretion of the university trustees, who, under the law, constitute only a part of the governing body of the extension department, and their powers were not increased by the tax act. p. 43.
3. COLLEGES AND UNIVERSITIES.—*Appropriations.—Agricultural Experiment Station.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, does not prevent the payment to the university of the appropriation of \$75,000 for the Agricultural Experiment Station provided in Acts 1909 p. 403, since the act makes the university only a trustee for the experiment station, which was originally provided for by act of Congress of March 2, 1881 (§8878 *et seq.* U. S. Comp. St. 1916), appropriating funds to the state for such purpose. pp. 44, 46.
4. COLLEGES AND UNIVERSITIES.—*Appropriations.—Statute.—Construction.*—In limiting appropriations to Purdue University by the Mill Tax Act (Acts 1913 p. 505), the legislature did not intend to exclude appropriations made in earlier acts to the

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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departments of agricultural extension and experiment work, since the legislature, at the same session, created other such departments, and made appropriations therefor to operate in the future, notwithstanding the limitations in the tax act. p. 46.

5. COLLEGES AND UNIVERSITIES.—*Appropriations.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue, does not affect the appropriations to the Agricultural Experiment Station provided in the Hog Cholera Act (Acts 1913 p. 333) and in the act relative to inspection of creameries (Acts 1913 p. 920, §6866a Burns 1914), this construction being manifest from the fact that the latter became effective on its passage—five days after the approval of the Mill Tax Act—and neither was payable to the university proper. pp. 47, 49.
6. COLLEGES AND UNIVERSITIES.—*Appropriations.*—*Statute.*—*Construction.*—The mention in the Mill Tax Act of 1913 (Acts 1913 p. 505) of the departments of Indiana University and the omission to mention the different departments of Purdue University indicate that the agricultural extension and experiment station departments of the latter were excluded from the use and benefit of the mill tax. p. 49.
7. COLLEGES AND UNIVERSITIES.—*Appropriations.*—*Statute.*—*Construction.*—That §4 of the Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, was to cut off appropriations for buildings and other special purposes, but not the previously established appropriations for the departments of agricultural extension and experiment work, is indicated by the fact that the legislature granted the university an appropriation greatly in excess of the amount demanded and provided that any surplus should not revert to the state but should be used for new buildings, a request for specific appropriations for new buildings having been denied. p. 50.
8. COLLEGES AND UNIVERSITIES.—*Appropriations.*—*Statute.*—*Construction.*—The federal appropriations for the agricultural experiment and extension departments of Purdue University may be terminated by the act of the state, and this fact warrants a construction of the saving clause in §4 of the Mill Tax Act (Acts 1913 p. 505) as applying to such appropriations, but not necessarily to the state appropriations. pp. 51, 53.
9. COLLEGES AND UNIVERSITIES.—*Appropriations.*—*Statute.*—*Construction.*—The appropriations for the departments of agricultural extension and experiment work in pursuance of federal acts are sufficiently permanent to be within §4 of the saving clause of the Mill Tax Act (Acts 1913 p. 505), and are therefore exempt from the provisions of the act limiting appropriations to the university. p. 53.

Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

10. COLLEGES AND UNIVERSITIES. — *Appropriations. — Statute. — Construction.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, did not repeal the act of 1913 appropriating to the university \$30,000 for greenhouse, \$28,000 for a new dairy building, and \$125,000 for the purchase of additional farm land for the agricultural department, since such sums under the tax act would not have become available until the year following, and there was immediate need therefor. p. 53.

From Marion Superior Court (99,089) ; *W. W. Thornton*, Judge.

Action by the State of Indiana, on relation of the trustees of Purdue University, against the Indiana State Board of Finance, the Governor and others. From a judgment for the plaintiff, the defendants appeal. *Affirmed.*

*Evan B. Stotsenburg*, Attorney-General, and *Wilbur T. Grueber*, for appellants.

*Allison E. Stuart*, *David E. Fulwider* and *Dan W. Sims*, for appellees.

HARVEY, J.—The general assembly of 1913 (Acts 1913, ch. 182, p. 505) provided a mill tax for the use and benefit of its educational institutions, Indiana University, Purdue University and the State Normal. This act increased the mill tax from two and three-quarters to seven cents. The act apportioned this tax two-fifths to Indiana University, two-fifths to Purdue University and one-fifth to the State Normal School.

This act contains the following: "When the funds provided for by this act for said educational institutions shall become available, said funds shall constitute the total amounts to be paid out of the treasury of the state to said institutions for any purpose, thereafter, and all acts and parts of acts in conflict with this provision are hereby repealed."

And the following proviso: "Provided, That nothing

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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in this act shall affect in any way any endowment or permanent fund or funds that may belong to or may have been appropriated for either Indiana University or Purdue University or the right of any of said institutions mentioned in this act to any taxes heretofore levied for their benefit, but all such taxes heretofore levied are hereby saved to said institutions.” §4.

Because of the quoted provisions, the state's then board of finance and the trustees of Purdue University disagreed as to whether an annual continuing appropriation of \$30,000 for what is known as the “Agricultural Extension Bureau” of the university, and also an appropriation of \$75,000 per annum for what is known as the “Agricultural Experiment Station” should be continued.

The state officers and said trustees also failed to agree as to whether certain other appropriations made at the 1913 session should be withheld from Purdue University because of said quoted provision.

The language above quoted which, it is claimed, prevents payment to the university of any fund other than the tax, and the language quoted which saves to the university certain funds, cannot be fully understood without reading in connection therewith the history of the financial provisions for maintenance of the university in its general and ordinary features; and for the maintenance of several special bureaus, stations and departments, which, though closely associated with the university, are not in a legal sense component parts thereof or administered thereby.

Failure to observe the distinction just suggested has resulted in confusion in some of the statutes to such an extent that the same cannot be reconciled when the exact language used is alone considered; whereas, when the character and purpose of the various special objects to be attained, and the means provided for administra-

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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tion to secure such objects are considered, much of such confusion disappears, and a reasonable result is reached, though the same may seem to conflict with some of the language found in the statute.

Having given careful consideration to such history, as disclosed by all the statutes relating to said matters, the court finds that the university proper has

1. been maintained to a large extent by appropriations or taxes for general and current expenses and for general maintenance, while another and distinct line of appropriations has been made, not for such maintenance, but, by express limitations, separated from such maintenance and confined to special purposes and departments. The court finds that while several of the latter class of appropriations were made to the university, or made payable to its treasurer, yet the expenditure thereof was not committed to the trustees thereof, as were all the general maintenance appropriations or taxes, but such expenditures were committed to special boards, committees, or other like bodies created by statute for the purpose.

Of the latter character is the \$30,000 appropriation herein contested. This is designed for the support alone of the Agricultural Extension Department. This department is the outgrowth of the creation by statute in 1889 (Acts 1889 p. 273, §3210 *et seq.* Burns 1914) of county institutes, for the instruction in the several counties of farmers and others in agriculture and kindred subjects. Instructors for the respective counties were to be selected by the committee of experimental agriculture and horticulture of the board of trustees, together with the faculty of the school of agriculture of Purdue University.

An original appropriation of \$5,000 was made for the purpose of paying the salaries of instructors and other necessary expenses, the same to be expended under the

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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direction of said committee of said board of trustees, "and they shall annually report such expenditures and the purposes thereof to the Governor." It will be noticed that the board of trustees of the university had nothing to do with this appropriation, only that part of the board constituting said committee. The committee and said faculty were not required to report to the board of the university. This appropriation was increased to \$10,000 in 1901 (Acts 1901 p. 92).

In 1907 (Acts 1907 p. 183, §3213 Burns 1914), to increase the moneys to be expended for the extension of farmers' institute work, it was provided by statute that the chairmen of such institutes should, under regulations adopted by the superintendent of county institutes, be entitled to draw from the treasury the sum of not exceeding \$100 once each year, and as justifying such expense such chairman shall file with the county auditor a list of members paying a membership fee of at least twenty-five cents and a statement of expenses, such expenses to include prizes for extraordinary excellence in agricultural and domestic sciences.

Payment of this appropriation for extension work was continued, notwithstanding the Mill Tax Act of 1895 (Acts 1895 p. 171, §6166a Burns 1901) prohibited any other payment to the university for maintenance than the tax created by the act of 1895. To meet an argument of appellants that this was a departmental construction favoring the idea that these special funds are not so prohibited, the state officers admit that the appropriation to the extension department was "in no sense an appropriation to Purdue University," and further say "said fund was not for the use of the university at all. It was only constituted the agent of the state in the expenditure of the fund in the encouragement of agriculture."

The above named acts of 1899, 1901 and 1907 were



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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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repealed in 1911 (Acts 1911 p. 80). Though this was an entirely new act, it provided for similar extension work in the various counties. It provided that local expenses not exceeding twenty-five cents for each square mile of territory in the county should be paid by the county, and directed the county councils to make appropriations therefor.

By this act of 1911 an appropriation of \$10,000 for the current year, and \$30,000 annually thereafter, was made to Purdue University, the act providing that said sum shall be expended by the school of agriculture and the agricultural experiment station of the university in securing the necessary office force, extension workers, lecturers and equipment, and other expenses of holding such institutes, contests, and any other such work agreed upon by the authorities of Purdue University, the work to be carried out by said Purdue University through the extension department of the school of agriculture and agricultural experiment station, under such rules and regulations as may be prescribed, and along the lines determined by the board of trustees, president of the university, the dean of the school of agriculture, the director of the Agricultural Experiment Station, the superintendent of agricultural extension, and the advisory committee named in the act of 1909, which committee was composed of one person appointed by each the State Corn Growers' Association, State Dairy-men's Association, State Live Stock Association, State Horticultural Society, and the State Poultry Fanciers' Association.

This appropriation of \$30,000 in controversy cannot, in view of the foregoing provisions, be found to be to the university for university purposes. Its ex-

1. penditure is not committed to the judgment and discretion of the trustees alone, though they are

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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by this act made part of the body to the judgment and discretion of which such expenditure is committed.

The workers, lecturers, and so forth, to whom it is paid out are not employes of the university. The county funds appropriated for local expenses do not concern the accounts of Purdue University, and yet they are in aid of the work to be done by the extension bureau. The facts impelling the appellants, state officers, to admit that the earlier appropriations for the use of the extension department were not made to the university apply equally to said funds under the new act of 1911, *supra*.

The theory of the appellant state officers is that the increase in the mill tax of 1913 was made so much larger than was asked by the university as to

2. clearly indicate, in connection with the prohibition above quoted, that the mill tax was to be used by the university to continue this extension work. If the provision of *funds* in the extension work statute is repealed, then no amount remains *fixed* therefor; and if appellants' theory is correct, it is left to the board of trustees of the university to parcel out the mill tax proceeds, and to fix the amount for the extension bureau and other such departments.

The law continuing this bureau continues the organization therefor prescribed by statute, including the body that is to fix salaries of instructors, and so forth; but if appellants are correct, that body has no fund except at the discretion of the trustees of the university, who, by the act, constitute only a portion of the governing body of the bureau and the tax act does not increase the power of the trustees in this respect.

If this theory is adopted, we find a complete abandonment by the state of a long-continued purpose that this bureau shall be *independent* as to *funds*, and as

1. to the extent of its work, and for that purpose

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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the expenditure of its funds shall be subject to the judgment of others than said trustees. In our opinion the trustees, or the treasurer of the university, are only designated as agents for the specific purpose of holding such special funds, and are not acting in their general capacity as officials of the university. A prohibition of payment to the university of other than the tax, for any purpose, does not prevent a payment to the trustees as such special agents.

A similar situation exists as to the agricultural experiment station, for which special appropriations have been made by the state since in 1887, the federal

3. government, by act of Congress (Act March 2, 1887, 24 St. at L. 440 [§8878 *et seq.* U. S. Comp. St. 1916]) declared that an agricultural experiment station "shall be established under the direction of the college, or colleges or agricultural department of colleges" in each state, created in compliance with an earlier grant of land scrip made by Congress. The Congress appropriated to the state the sum of \$15,000, to be paid annually, "to the treasurer, or other officer, appointed by the governing boards of such colleges to receive the same" for experimental work, and for the printing and distribution of the results thereof. Congress provided that such appropriation shall be equally divided between any two such colleges then, or thereafter, established in any state. The act of Congress directed specifically, and also generally, the character of experiments to be made, and that the *station* shall co-operate with the Secretary of Agriculture in establishing and operating subsidiary stations for certain purposes. It is made the duty of the Secretary of Agriculture to furnish forms for the tabulation of results of experiments, and to indicate from time to time such lines of inquiry as "to him shall seem most important." That it shall be the duty of each such sta-

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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tion to report annually to the Governor of the state (not to the college) a full and detailed statement of its operations, and of its receipts and expenditures, a copy of which shall be sent to each of such stations and to the Commissioner of Agriculture, and to the Secretary of State of the United States; this financial statement to be on a form prescribed by the Secretary of Agriculture. Bulletins are required to be sent each three months to each newspaper in the state, and to individuals requesting the same, these to be transmitted by mail free of postage charge. Congress provided that the *state legislature* may apply said appropriation, in whole or in part, to such stations established in connection with *any* college or university, or institution, not distinctly an agricultural college or school, or to such *stations* established *separate* from such colleges, or established in connection with an agricultural college; and the congressional act expressly provides that "no legislature shall by contract, express or implied, disable itself from so doing." The act reserves the right to annul, suspend or repeal any or all said provisions. The state accepted said terms and appropriation for and on behalf of Purdue University, and such a station was established.

In 1906 the Congress (Acts March 16, 1906, 34 St. at L. 63 [§8891 *et seq.* U. S. Comp. St. 1916]) made an appropriation "to each state," for the more complete endowment of agricultural experiment stations, a sum to be increased annually until the amount of \$30,000 was reached, and \$30,000 annually thereafter, to be paid to the officer designated by the "governing *Boards of such experimental stations*," (note this right of designation is by this act withdrawn from the governing board of such colleges) and the officer so designated to receive said appropriation shall annually report to the Secretary of Agriculture a detailed state-

Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

ment of disbursements, and also to the Governor of the state for transmission to the Secretary of Agriculture and the Treasurer of the United States.

The state made various appropriations to Purdue University for this experiment station, and for buildings therefor; and in 1905 (Acts 1905 p. 142) made an appropriation to Purdue University of \$5,000 for the year 1905, and of \$25,000 annually thereafter; and provided that said \$5,000 should be expended by the director of the experiment station for general purposes named; and said \$25,000 should be expended by the agricultural department of the university in designated sums for specific purposes; and further provided that the work outlined should be carried out by said department along lines agreed upon by said director and an advisory committee of three, one of whom shall be appointed by the corn growers' association, one by the dairymen's association, and one by the live stock association.

In 1909 (Acts 1909 p. 403, §6864 *et seq.* Burns 1914) the last-mentioned act was so amended as to appropriate \$75,000 per annum to Purdue University "for

3. the exclusive use of the experiment station of the university." This act added to the advisory committee one person, to be appointed by the state horticultural association, and one by the state poultry fancier's association. The continuance of this appropriation is in question here. It is not an appropriation to the university as a university, but as a trustee for such station, and the tax act of 1913, *supra*, neither repeals this provision for the station, nor changes the organization of its management.

That neither the extension bureau nor the experiment station is deemed such parts of the university that the mill tax is intended therefor to the exclusion of

4. earlier appropriations is emphasized by the fact

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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that the state at the same session, 1913, at which it passed the Mill Tax Act in question created other such departments, or bureaus, and made certain annual appropriations therefor to operate in the future, notwithstanding the prohibition in the mill tax act of other funds to the university than the tax.

The act of March 7, 1913 (Acts 1913 pp. 333-338, §3273a *et seq.* Burns 1914), commonly known as the

Hog Cholera Act, appropriates \$15,000 "to be

5. paid to the director of the Purdue University Agricultural Experiment Station \* \* \* the same to be paid into the treasury of said Purdue University, the board of control of which shall expend the same upon proper vouchers to be filed with the auditor of state." "The annual report of the director of the experiment station shall" show the receipts and disbursements of fees received under this act. It is to be remembered that this annual report is to the Governor for the federal officers.

This act appropriates \$10,000 annually "to the Indiana State Veterinarian," who shall expend the same upon proper vouchers to be approved by the Governor, and filed with the auditor of state; the same to be used for expenses and assistants in carrying out the provisions of the *Hog Cholera Act*. This act was approved three days before the approval of the Mill Tax Act.

On March 15, 1913 (Acts 1913 pp. 920-927, §6866a *et seq.* Burns 1914), an appropriation was made of \$1,000 annually to Purdue University for the exclusive use of Purdue University Agricultural Station, same to be paid to the treasurer of the university, and expended for the purpose of providing necessary equipment and paying the expenses of inspection of creameries, the examination and testing of glassware, the examination of candidates for license as testers, and the dissemination of information and instruction by means of publications

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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and otherwise; all testing and weighing apparatus to be inspected and stamped by the agricultural experiment station. Testers' licenses were to be issued and to be revoked by the experiment station upon the certificate of an examining board, this examining board to consist of two members appointed by the examination committee of the Indiana State Dairy Association, and the third member shall be chief of the dairy department of Purdue University Experiment Station. For such licenses a fee of \$2 shall be paid to the Purdue University Experiment Station.

A license to operate a creamery is required to be issued by the Agricultural Experiment Station, upon payment to the station of a fee of \$6. Creameries shall pay to the experiment station three cents for each piece of glassware examined. The sums so received shall be by the director of the experiment station paid to the treasurer of Purdue University, to be paid out by the board of control for expenses of carrying out the terms of the act, and other expenses of the experiment station. The director of the station shall include in his annual report to the Governor a statement of such receipts and expenditures.

This act was approved five days after the tax act was approved. This act makes the milk-testing department more a part of the experiment station than of Purdue University proper, and directs that operations thereunder be performed by the officers of the experiment station, and the examining board referred to, rather than by, the trustees of the university. The treasurer and the board of control of the university act only as holding trustees of funds to be paid out on obligations incurred by others. The reports of operations and expenditures go to the Governor, rather than to the trustees.

The tax act could not produce a revenue within one

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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year, and the declaration of the assembly was that this appropriation of \$1,000, made five days after the

5. tax act was approved, should be effective immediately, and there is no provision that this appropriation should cease when the tax produced a revenue. This act further shows that the revenues of these departments are not in the maintenance funds of the university. All things considered, we conclude that this appropriation was not to the university. The repealing clause of the tax act, approved five days prior, did not affect this appropriation, and the saving proviso has no bearing upon the same.

The act creating the tax provides that the levy shall be made for the use and benefit of the "Indiana University, (Indiana University School of Medicine

6. and Hospital) Purdue University and the Indiana State Normal School." It is significant that the assembly expressly mentioned, as provided for by the levy, the medical school and hospital of Indiana University, and did not mention, as provided for by the levy, any of the departments of Purdue University, though the same are in their organization and operations as distinct from Purdue as though geographically separate from Purdue University. The mention of the departments of one as covered by the tax at least argues that the failure to mention the departments of the other excludes the latter departments from the use and benefit of the tax.

It is argued that if these special appropriations are not cut off by the prohibition against payment to Purdue of other than the tax "for any purpose," then said prohibition in the act is useless and has no purpose, and that the court is not at liberty to disregard any word or phrase in the act if a reasonable use and meaning can be assigned thereto.



Here, again, we must consider the conditions existing at the passage of the act; and by so doing we find a reason for the prohibition in §4, though said

7. prohibition cuts off no annual appropriation.

The university had repeatedly asked prior sessions of the assembly for appropriations for buildings and additional land, and many of said requests had been denied. At this session the university asked not only for twice the amount of tax it was then receiving but asked appropriations for additional land, and for at least eight additional buildings. The estimated amount of these needs was \$395,000. The assembly declined to make such special appropriations, except as to three matters hereafter mentioned. The assembly granted an increase of tax almost double the increase asked, and prescribed that any surplus of such tax should not revert to the state, but should remain to the credit of the university for buildings and physical improvements. This was a radical departure from any provision for buildings theretofore made; all former funds for buildings had been specifically appropriated. Having thus provided an increased maintenance fund for the university and for buildings, the legislature stipulated that "when the funds provided for by this act \* \* \* shall become available, said funds shall constitute the total amounts to be paid out of the treasury of the state to said institution for any purpose," and repealed all conflicting laws. Of course, this declaration was not binding on future sessions, but it expresses the opinion of the session of 1913 that said tax must be sufficient for all needs of the university proper, and thus we find a reasonable meaning for the prohibitive words consistent with the continuation of the special departments under the management of others than the trustees of the university, and the continuation of fixed amounts for their

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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maintenance, and no disturbance of the separate identity or management of either such department.

It is also argued that, if these special appropriations are not affected by said prohibition, then there exists no occasion for the proviso which saves endowments and permanent funds appropriated to the university, because it is asserted the latter cannot be repealed.

We find ample reason for the saving of such so-called endowment and permanent funds, though the same may be in a sense properly denominated as endow-

8. ment or permanent. The Indiana Agricultural

College, now known as Purdue University, was established in accord with the terms of an act of Congress appropriating in 1862 land scrip to each loyal state (Act July 2, 1862, ch. 130, 12 St. at L. 503), to be sold and the proceeds to constitute a perpetual fund, the income "of which shall be inviolably *appropriated by each state* to the endowment, support and maintenance of at least one college where the leading object shall be," briefly stated, the study of agriculture and associated sciences. In 1865 Indiana accepted the conditions named, and directed that the trustees of said college should by their treasurer receive said scrip, and invest the proceeds thereof. The fund so derived produces the sum of \$17,000 per year for the university. Purdue's right to such interest grew out of an *appropriation by the state*.

Decisions have been rendered in several of the states, and by the Supreme Court of the United States, that this fund is by Congress appropriated to the state, and no college is entitled thereto until appropriated to the college by the state. *State, ex rel. v. Irvine* (1905), 14 Wyo. 318, 84 Pac. 90, affirmed by Supreme Court of United States, 206 U. S. 278, 27 Sup. Ct. 613, 51 L. Ed. 1063. See, also, *Haire v. Rice* (1906), 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; *Brown University v.*

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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*Rhode Island College* (1893), (C. C.) 56 Fed. 55; *Massachusetts Agrl. College v. Marden* (1892), 156 Mass. 150, 30 N. E. 555.

In 1890 (Act August 30, 1890, ch. 841, 26 St. at L. 417 [§§8871-8876 U. S. Comp. St. 1916]) Congress appropriated "to each state \* \* \* for the more complete endowment of such colleges then or thereafter to be established a sum to be increased annually until amounting to \$25,000, said sum to be paid to the state treasurer, or such other officer as the state may designate, who shall, upon the order of the trustees of such college, pay the sum over to the treasurer of such college." This law provides that when a state has established an educational institution of like character for colored students, the state may make a "just and equitable division" of this fund between the college and such institution.

The Secretary of the Interior shall annually certify to the Secretary of the Treasury whether any state continues to be entitled to said appropriation, and Congress reserved the power to amend, suspend or repeal any or all the provisions of the act. In 1891 the state accepted said appropriation and designated Purdue University as the agricultural college entitled to said grant. In 1907 (Act March 4, 1907, 34 St. at L. 1281 [§8877 U. S. Comp. St. 1916]) the foregoing act was amended to increase said appropriation to \$50,000, to be paid to the state annually, for the further endowment of such colleges.

It is the contention of the university that these federal appropriations belong to the university and are not subject to repeal by legislative act of the state, and that there was no occasion for saying the same by the proviso in said tax act; and that it follows that the proviso was intended to save the other continuing annual state appropriations.

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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It is the contention of the state that the federal appropriations are subject to repeal or division, or loss, by some act of the state; and that, therefore, there was reason for saving the federal funds by said proviso, and hence the state appropriations are not referred to in the proviso, but are cut off by the prohibition of other funds than the tax.

It is the opinion of the court that said federal appropriations may be destroyed by some act of the state, and that there was occasion for a declaration prevent-

8. ing the tax act from affecting the same. It further results that the saving provision does not necessarily relate to the state appropriations.

If, however, we are wrong in holding that these state appropriations belong exclusively to the several departments and bureaus, then they belong to the uni-

9. versity, and are cut off unless saved. In the sense that the state must continue, somehow and somewhere, such departments to continue its right to the federal appropriations, and in view of the fact that Purdue University is now and probably always will be the state's only agricultural college, it may be fairly said that said appropriations are sufficiently permanent appropriations to fit the definition of said saving clause, and said clause is broad enough to include them, or exempt them from said prohibition.

Four funds in question remain to be considered. Three of them are specific appropriations contained in a general appropriation act, approved March 11,

10. 1913, the next day after the tax act was approved (Acts 1913 p. 515), to wit: "For Purdue University Green-house, \$30,000; equipment for new dairy building, \$28,000; for purchase of additional farm land for the agricultural department, the Governor is hereby authorized and directed to apply a sum not exceeding \$125,000, if in the judgment of the Auditor of

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Indiana State Board of Finance v. State, ex rel.—188 Ind. 36.

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State and Treasurer of State suitable lands can be procured."

The tax act was designed to produce a surplus which was to be the only fund for buildings and physical improvement. The first of this tax was not available, however, until 1914. The legislature evidently deemed said greenhouse and dairy equipment and additional land immediately needed, and, having power, notwithstanding the prohibition mentioned to so do, appropriated for these three needed purposes. The appropriation for additional land was not to the university, nor subject to order of its trustees, though for its benefit. Its use was committed to the judgment of the officers named. Payment of these funds was not prohibited, nor were these appropriations repealed. Only that part of each which is called for by contracts duly made for these several purposes can be paid out, and, hence, the order herein that they shall be paid to the university is to be construed as requiring payment only to the amount and in discharge of such contracts.

Finally, an appropriation was made on March 13, 1913 (Acts 1913 p. 572), for maintenance, in lieu of increasing the tax levy for 1913, of \$32,500, providing that in event a change in the *educational* tax is made, this appropriation shall be available only until the new tax is available, when an adjustment between this appropriation and the new tax is to be made by the state auditor to avoid duplication. The trial court denied the right of the university to any further part of this appropriation after the decree. This part of the decree is not questioned here, and this appropriation is mentioned only to show that the assembly was mindful of the current, immediate needs of the university, and therefore intended that the other specific amounts for building and land should be paid.

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Poer, Trustee, v. State, ex rel.—188 Ind. 55.

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We find no error in the conclusions of law excepted to, and affirm the judgment.

NOTE.—Reported in 121 N. E. 649. Appropriations, what are, note 22 Am. St. 638.

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POER, TRUSTEE, v. STATE OF INDIANA, EX REL.  
ARTHUR M. HINSHAW.

[No. 23,389. Filed December 13, 1918. Rehearing denied February 11, 1919.]

1. PLEADING. — *Demurrer*. — *Attached Memorandum*. — Section 344, cl. 6, Burns 1914, Acts 1911 p. 415, providing that a memorandum shall be filed with a demurrer stating wherein the pleading demurred to is insufficient for want of facts, was intended to compel the party demurring to waive review of questions not disclosed to the trial court; but neither the trial court nor the appellate court is bound by such waiver where manifest injustice would result by enforcing it. p. 59.
2. MANDAMUS. — *Schools*. — *Transfer of Pupil*. — *Sufficiency of Complaint*. — The validity of §6449 Burns 1914, Acts 1909 p. 173, relative to the transfer of pupils, will not be determined in a mandamus action to compel a township trustee to transfer a pupil to a private school, where the complaint fails to allege an appeal to the county superintendent and an order for the transfer under §6451 Burns 1914, Acts 1901 p. 448, since the superintendent has authority under the statute to decide certain purely school questions and his decision, based on such questions, denying a transfer would prevent the question of validity to arise. p. 59.
3. CONSTITUTIONAL LAW. — *Necessity for Judicial Action*. — The Supreme Court will not pass on constitutional questions that are hypothetical, nor determine the validity of a legislative act when such determination is not necessary to dispose of the cause. p. 60.

From Henry Circuit Court; *Fred C. Gause*, Judge.

Mandamus by the State of Indiana, on relation of Arthur M. Hinshaw, against Otho Poer, trustee of Spiceland school township, Henry county. From a judgment for the relator, the defendant appeals. *Reversed*.

*W. O. Barnard and G. M. Barnard, for appellant.*  
*Forkner & Forkner, for appellee.*

TOWNSEND, J.—Relator brought action against appellant to mandate him to transfer relator's child to a private school. The complaint alleges, in substance, that relator was a resident citizen and taxpayer of the township on September 12, 1917; that appellant was on that date the elected and qualified trustee of the school township; that relator's son was born on January 20, 1903, and resided in said township with relator; that his son had finished the prescribed course of study in the eight grades taught in the public schools of the township and was eligible to a public high school of the county; that there were no high schools in said township and none nearer than Lewisville and Newcastle in adjoining townships, a distance of five to eight miles; that the transfer of relator's child to some recognized high school was necessary, or his education in such grades would be denied him; that there was and is in the town of Spiceland, within said township, an academy known as Spiceland Academy, kept and maintained as a private school; that said private school is ready, able and willing to receive relator's child under the terms provided for the transfer of pupils from one school corporation to another; that the course of study in this private school is the same as that taught in the high schools of said county; that said school and the course of study therein had been approved by the state board of education; that relator's son can better be accommodated in said academy than at any other school, and at less expense; that relator and his child live within two miles of said private school, much nearer to it than any other high school; that relator demanded of appellant on September 12, 1917, that he transfer relator's son to this private school; that said trustee refused to make said transfer.

Appellant's demurrer to the complaint is on the ground that it does not state facts sufficient to constitute a cause of action. The memorandum attached to the demurrer is as follows: "The defendant, as trustee of the school township has no authority in law to transfer pupils eligible to High School privileges to any other than a public High School. That any payment of public money to Spiceland Academy as tuition for the son of the relator would be illegal and void and for this reason he could not make the transfer requested by said relator. That Spiceland Academy is a private and denominational school, the same being under the control of Spiceland Monthly Meeting Society of Friends, which elects the trustees for said Academy and that said trustee has no right or authority in law to transfer any pupil eligible to a High School to such a school as said Academy." This demurrer was overruled. Appellant refusing to plead further, judgment was rendered.

The law, supposed to be invoked by the facts in the complaint, is contained in the following sections of the statute: "Whenever any child, resident in one school corporation of the state, may be better accommodated in the school of another school corporation, the school trustee, board of school trustees or commissioners of the school corporation in which such child resides shall, upon application of the parent, guardian or custodian of such child, made at any time, grant an order of transfer which shall entitle such child to attend the schools of the corporation to which such transfer is made under the conditions hereinafter prescribed: Provided, That in determining whether a child can be better accommodated in the schools of another school corporation than that in which such child resides, such matters as the proximity of the schools of the township and city to the residence of such child desiring the transfer; the kind and character of the roads to each; the means of



transportation, if any, to each; the crowded conditions of the schools in either of the two school corporations shall be pertinent: And, Provided, further, That the desire to attend a commissioned or accredited high school, when no such school is maintained in the resident school corporation, or when in attending such commissioned or accredited high school the living expenses can be more advantageously provided for in another school corporation, or when such commissioned or accredited high school in another school corporation is more accessible, shall be deemed reasons for such transfer: And Provided, further, That the provisions of this act shall be construed as applying in the same manner to resident pupils who are graduates from the eighth grade in the common schools of this state, or its equivalent, who may desire to attend a private school of the secondary rank, which, having been duly approved by the state board of education, holds the same rank as a commissioned high school." §6449 Burns 1914.

"If an order of transfer be denied, the parent, guardian or custodian of the child shall have the right to appeal the case to the county superintendent of schools whose decision shall be final." §6451 Burns 1914. The above sections set out are respectively §1 of Acts 1901 p. 448, as amended by Acts 1909 p. 173, and §3 of Acts 1901 p. 448.

A casual observer will note that there is a total omission of the fact that relator appealed the case to the county superintendent of schools, and that he ordered the transfer. It will also be observed that the memorandum attached to the demurrer in no way points out the omission of this ultimate fact essential to the sufficiency of the complaint.

The proviso in subdivision 6, §344 Burns 1914, Acts 1911 p. 415, is that "a memorandum shall be filed there-

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Poer, Trustee, v. State, ex rel.—188 Ind. 55.

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with stating wherein such pleading is insufficient

1. for want of facts, and the parties so demurring shall be deemed to have waived, etc.” This was intended to compel the one demurring to waive review on appeal of that which was not disclosed to the trial court. It does not follow, however, that this or the trial court is bound by such waiver. If the courts are to be bound always by such waiver, absurdities and injustice would result in many cases. It would take from the courts the power to decide justly. For instance, a complaint may be filed which is intended to invoke a certain law, and may ask a remedy not authorized by the law invoked. An action for negligence might be brought under a statute which expressly or by implication excluded such remedy. Can it be said that this or the trial court shall be compelled to let such a glaring injustice stand because purposely or inadvertently the question has been waived by the parties? To hold this would be to hold that the parties by the authority of the legislature could prevent courts from administering justice.

Although the provisions of the statute concerning the transfer of a pupil to a high school are plain and §6451

Burns 1914, *supra*, expressly says there shall be

2. an appeal to the county superintendent of schools, relator seems to have avoided doing this, and appellant seems to have avoided pointing out this omission in the complaint. They are here debating whether the last proviso in §6449 Burns 1914, *supra*, and other sections of the same act are valid or not under the Constitution. It is not meant by this opinion that the county superintendent of schools shall decide a constitutional question. It will be observed, however, that §6449 Burns 1914, *supra*, contains a number of things for him to decide which are purely school questions, to wit: “Proximity of schools, \* \* \* kind and char-

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Zuver v. State—188 Ind. 60.

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acter of roads, \* \* \* means of transportation, \* \* \* crowded condition of schools, etc." These things might be decided by the county superintendent adversely to relator's contentions, and then no question of the validity of the last proviso in the above section would arise.

This case has been advanced in this court because of its alleged public importance. If it is of public importance, and we think that it is, this importance

3. should have attached to the case all the way through and it should have been brought before us in such a way as to warrant a decision of the constitutional questions involved. It is not for this court, under precedents laid down by state and federal courts, to pass on constitutional questions that are hypothetical, nor to determine the validity of the legislative act when such determination is clearly not necessary to dispose of the cause.

The complaint should have alleged an appeal to the county superintendent of schools and that he ordered the transfer.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the complaint.

Spencer and Harvey, JJ., concur in conclusion.

NOTE.—Reported in 121 N. E. 83. Schools and school districts: power and authority of school officers, generally, 65 Am. St. 332.

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### ZUVER v. STATE OF INDIANA.

[No. 23,494. Filed February 11, 1919.]

1. CONTEMPT.—*Indirect.*—*What Constitutes.*—Under §1044 Burns 1914, §1009 R. S. 1881, the publication of an unjustifiable criticism of a court, even though inaccurate or false and prompted by malicious motives, does not constitute contempt, where the matter had been fully disposed of before the criticism was published. p. 62.

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Zuver v. State—188 Ind. 60.

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2. **CONTEMPT.—Purging of, by Answer.**—When one undertakes to purge himself by a verified answer in a proceeding for indirect contempt, the facts alleged must be treated as true, and, if the facts so alleged under oath are sufficient to show that no contempt was committed, the defendant must be discharged, although he may be prosecuted for perjury if the answer is false. p. 63.

From St. Joseph Circuit Court; T. D. Mott, Judge.

Proceeding by the State of Indiana against John Henry Zuver for indirect contempt of court. From a judgment of conviction, the defendant appeals. *Reversed.*

*Anderson, Parker, Crabill & Crumpacker, Vernon W. Van Fleet, Drummond & Drummond, W. P. O'Neill, Eli F. Seebirt and John G. Yeagley, for appellant.*

*Ele Stansbury, Attorney-General, and Edward M. White, for the state.*

**LAIRY, J.**—This appeal is from a judgment of the superior court of St. Joseph county rendered in a proceeding for indirect contempt of that court. The facts were brought to the attention of the court by a verified information filed therein by one S. R. Thomas, the courtroom bailiff, by which information the court was given to understand and know that appellant was, on March 27, 1918, the editor of the South Bend Times, which was a daily newspaper published at the city of South Bend, Indiana. From the facts stated in the information it appears that a divorce had been granted by the St. Joseph Superior Court to the plaintiff in a proceeding entitled Emma B. Rineholt v. Landon B. Rineholt, and that the decree awarded to the plaintiff the custody of a child and made provision for the payment by the defendant for the support of such child the sum of two dollars on Monday of each week until the further order of the court. It further appears that on November 5, 1917, the defendant filed a petition to modify the order

as to the payment of money for the support of the child, which motion was set for hearing in the St. Joseph Superior Court on March 26, 1918. On that day the defendant filed an affidavit for a change of venue from the judge on the ground of bias and prejudice. It appears that the court did not rule on this motion for a change of judge at the time it was filed, but that the matter was taken under advisement by the court, which soon thereafter adjourned for the day, and the information does not disclose when the court did rule on this motion. It is charged that, on the day following, appellant published in the newspaper of which he was the editor an article which purported to be a report and comment on the proceedings had before the court on March 26, 1918, concerning the matter of the motion for the modification of said order and decree, the filing of the motion for a change of judge and the taking of the same under advisement by the court. The article published is set out in full, together with the headlines under which it appeared; and upon this article is based the charge of indirect contempt of court.

For the purpose of purging himself of the contempt charged appellant filed a sworn answer in two paragraphs. In the first paragraph of answer he ad-

1. mitted the publication of the article as set out in the information, but denied that he wrote the headlines or that he had any knowledge concerning the same until he saw the article after its publication. As a part of this paragraph of answer and as a reason why he should not be punished for contempt, appellant asserts under his oath that the proceeding referred to in said published article was not pending before the court at the time such publication was made, but that it had been fully and finally decided and determined before that time. If this statement is true, the publication of the article would not constitute a contempt of court,

even though it may have been inaccurate or false and may have been prompted by improper or malicious motives. Under such circumstances the publication of the article might constitute an unjustifiable criticism of the conduct of the court, but it would not amount to contempt, because not made with reference to proceedings pending in the court at the time. §1044 Burns 1914, §1009 R. S. 1881. *Cheadle v. State* (1887), 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199.

When a defendant undertakes to purge himself by a verified answer filed in a proceeding for indirect contempt of a criminal nature, the facts stated

2. therein must, in such proceeding, be treated as a verity. If the facts so stated under oath are sufficient to show that no contempt was committed, the defendant must be discharged. *Baker v. State* (1914), 183 Ind. 1, 108 N. E. 7, L. R. A. 1915D 1061; *Burke v. State* (1874), 47 Ind. 528. The rule thus stated is very ancient and it is still followed. Mr. Blackstone says: "If a party can clear himself upon oath, he is discharged; but, if perjured, he may be prosecuted for perjury." Blackstone, Commentaries Complete 995.

The trial court erred in refusing to discharge appellant upon the facts stated in his own sworn answer. Other questions presented are not considered. The judgment is reversed, with instructions that appellant be discharged.

NOTE.—Reported in 121 N. E. 828. Contempt, definition, 135 Am. St. 272. See under (2) 9 Cyc 44.

## SMITH v. STATE OF INDIANA.

[No. 23,457. Filed February 11, 1919.]

1. **CRIMINAL LAW.—Deferred Sentence.—Loss of Jurisdiction.**—Where a defendant was sentenced after two full court terms had elapsed and more than nine months after pleading guilty and seven months after his release from serving a sentence on a conviction of another offense during which time he was not in the custody of the court, the sheriff, or sureties, no cause for the delay being shown, the court had no jurisdiction to impose sentence, in view of §§202, 290, 295, Acts 1905 p. 584, §§2073, 2166, 2171 Burns 1914, providing for sentence unless there be cause for delay, or for placing the defendant in custody of the sheriff. (*Ledgerwood v. State*, 134 Ind. 81, distinguished.) p. 66.
2. **CRIMINAL LAW.—Sentence.—Rights of Defendant on Plea of Guilty.**—Where the defendant has pleaded guilty he need not require the court to perform its duty of pronouncing sentence in order to protect himself from the court's failure to act. p. 68.
3. **CRIMINAL LAW.—Deferring Sentence.—When Permissible.**—Courts may defer sentence to a subsequent day or term when justice demands it or for cause shown. p. 69.
4. **CRIMINAL LAW.—Review.—Delayed Sentence.—Presumption.**—Where the record is silent as to the reason for the postponement of sentence upon a plea of guilty, the Supreme Court will not presume that the postponement was justifiable. p. 69.

From Delaware Circuit Court; *William A. Thompson*, Judge.

Prosecution by the State of Indiana against Romeo Smith. On the overruling of motions to vacate and to modify the judgment of conviction, rendered on a plea of guilty, the defendant appeals. *Reversed.*

*George W. Cromer* and *Harry Long*, for appellant.  
*Ele Stansbury*, Attorney-General, and *Edward M. White*, for the state.

MYERS, J.—On January 10, 1918, appellant was sentenced to pay a fine of \$250, and to imprisonment on the Indiana State Farm for a period of six months. On

January 28, 1918, appellant filed his verified motion to set aside and vacate said judgment, which motion was overruled February 1, 1918; thereupon he filed his verified motion to modify the judgment. This motion was overruled. From the judgment thus rendered appellant has appealed to this court, and has assigned as error: (1) The overruling of his motion to set aside and vacate the judgment; (2) the overruling of his motion to modify the judgment.

Counter-affidavits were filed by the Honorable William A. Thompson and the deputy sheriff of Delaware county denying certain statements of fact contained in appellant's motion to vacate the judgment. The facts thus questioned, we will not undertake to settle. With these facts out of the way, this case is before us under practically an agreed statement as follows: Two indictments were returned by the grand jury at the January term, 1917, of the Delaware Circuit Court, one on January 6, and one on January 16, hereafter referred to as the first and second respectively. On March 19, 1917, appellant appeared in the Delaware Circuit Court, and before the Honorable William A. Thompson, sole judge thereof, and entered a plea of guilty to each of said indictments. He was then permitted to go hence on bond for his appearance in that court on May 22, 1917. He appeared in court as stipulated in the bond, and before the judge thereof, who then and there on appellant's plea of guilty, theretofore entered to the first indictment, pronounced judgment and sentence fixing a fine of \$250 and imprisonment on the Indiana State Farm for a period of three months. Appellant paid the fine and costs assessed against him, and was imprisoned in accordance with the sentence imposed. The term of his imprisonment expired on August 22, 1917, at which time he was released and then and there



returned to his home in Muncie, Indiana, where he has continuously resided, and within the jurisdiction of the Delaware Circuit Court.

No action whatever was taken by the court on appellant's plea of guilty to the second indictment prior to January 10, 1918, at which time, on order of the

1. court, the sheriff of Delaware county brought appellant into court and judgment was then and there rendered against him on his plea of guilty entered more than nine months prior thereto, and more than seven months after the time of his sentence on the first indictment. Appellant was forty-eight years old at the time he pleaded guilty, and from the time of his release from the state farm he was not in the custody of the court or sureties until said January 10. There is no claim of any attempt on the part of the court to follow the provisions of §§2174, 2176 Burns 1914, Acts 1907 p. 447, §§1, 3, known as the parol or suspending sentence statute.

Appellant insists that under this state of the record, the Delaware Circuit Court had no authority or jurisdiction to pronounce judgment or sentence him on January 10, 1918.

Section 2166 Burns 1914, Acts 1905 p. 584, §290, of our Criminal Code provides that: "After a finding or verdict of guilty, against the defendant, if a new trial be not granted, or the judgment be not arrested, the court must pronounce judgment." And §2171 Burns 1914, Acts 1905 p. 584, §295, provides that: "If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered." Under §2073 Burns 1914, Acts 1905 p. 584, §202, "If the accused plead guilty, said plea shall be entered on the minutes, and he shall be sentenced, or he may be placed in the custody of the sheriff until sentenced." The remainder of this section has reference

to an accused under the age of twenty-one years, and can have no bearing on the question here for decision.

The state has called our attention to the case of *Gray v. State* (1886), 107 Ind. 177, 8 N. E. 16. That case holds that any agreement to compound, discontinue or delay a prosecution, is forbidden by the statute, and is illegal and void. It also reaffirmed the doctrine announced in the case of *Smith v. Hess* (1884), 91 Ind. 424, to the effect that the trial court under the provisions of §2073, *supra*, had no power to permit the accused to depart from court without sentence, subject to arrest in case he did not behave well. The ruling thus made is in harmony with the holding of this court in *Shaffer v. State* (1885), 100 Ind. 365. In this last case there was an order-book entry showing that the sentence was suspended. A motion to discharge the accused on the ground that the order suspending sentence amounted to a judgment which was not subject to change or amendment was overruled, and the defendant sentenced. This action of the court was upheld for the reason that it did not appear from the record that the judgment was unnecessarily delayed. In the *Smith* case this court said: "The legitimate inference from the statute is that the Legislature, in its enactment, did not intend that the courts should allow adult offenders to go on good behavior. Without deciding what might be the result of such a practice, upon a proper case made, and properly brought before us, we may say that, as at present advised, we do not feel like giving our sanction to that practice."

The case of *Ledgerwood v. State* (1893), 134 Ind. 81, 33 N. E. 631, is cited by the state in support of its contention that the trial court did not lose jurisdiction to punish appellant on his plea of guilty. That case holds that the court's failure to render judgment, after a plea of guilty, until the next term, will not divest its

jurisdiction. By reference to the record in that case, it will be observed that the defendant was at all times after his arrest in the custody of the court. The reason for the postponement does not appear in the opinion, but the record shows just cause. This fact would be sufficient to distinguish it from the case at bar, for in this case no cause is shown for the delay of two full terms between the term at which the plea of guilty was entered and the term at which the sentence now under consideration was pronounced.

There is no reason or authority for saying that an accused must not only do what the law requires of him, but that he must go farther and compel the

2. court to perform a plain statutory duty, if he would protect himself from the motives of the court's failure to act. As said in the case of *People v. Kennedy* (1885), 58 Mich. 372, 25 N. W. 318: "The defendant, even after conviction, has some rights that a court is bound to respect, and is entitled to have his liberty as soon as the limit of the law, reasonably administered, will permit." In the case of *In re Flint* (1903), 25 Utah 338, 71 Pac. 531, 95 Am. St. 853, the court in its opinion, after recognizing the right to defer sentence from time to time for a proper purpose said: "But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him rearrested, and impose a sentence of either fine or imprisonment on him." In *Grundel v. People* (1905), 33 Colo. 191, 79 Pac. 1022, 108 Am. St. 75, the order entry of the trial court at the August term fixed no definite time within which sentence should be pronounced. "The defendants were released upon their own recognizance. Whether or not they would ever be called to the bar for sentence was contingent upon the action of the

prosecuting officer." More than three years elapsed before any action was taken, when, over the objection of the defendant, judgment was rendered and sentence imposed. The court held that "In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term. Such postponement is, in effect, a discharge of the prisoner, and therefore ousts the court after the expiration of the term of further authority over him.—*People v. Allen*, 155 Ill. 61; *Commonwealth v. Maloney*, 145 Mass. 205; 25 Enc. Law (2d ed.), 314; *In re Flint* (Utah), 71 Pac. 531; *Weaver v. People*, 33 Mich. 296; *People v. Barrett*, 202 Ill. 287; *U. S. v. Wilson*, 46 Fed. 748."

The rule is fairly well settled that courts may defer temporarily final action upon a plea of guilty or upon a conviction to a subsequent day or term, when it

3. appears that the interest of justice demands it or as said "for cause shown," and cause is shown when time is allowed the accused to move for a new trial, or in arrest of judgment, or to take other steps involving delay allowed by statute, or the practice of the court, or for the purpose of hearing evidence on the question of punishment. *Smith v. Hess*, *supra*; *State v. Ray* (1879), 50 Iowa 520; *People v. Kennedy*, *supra*; *People v. Felker* (1886), 61 Mich. 110, 27 N. W. 869; *State v. Watson* (1888), 95 Mo. 411, 8 S. W. 383.

The Attorney-General insists that, inasmuch as all presumptions must be indulged in favor of the action of the trial court, and the record being silent as

4. to reasons for postponing sentence, this court must assume that the delay was justifiable. We cannot agree with this contention. In this case no record was made other than the entry of appellant's plea of guilty. This case must be decided upon the record which shows affirmatively the facts which we have

heretofore recited. Sections of the statute to which we have referred furnish the rule adopted by the general assembly of this state for the guidance of courts in cases of conviction or upon pleas of guilty. The fact that no order-book entry was made, or agreement entered into whereby sentence was to be postponed, will not be sufficient to overcome the facts disclosed by this record. If there had been a final judgment accompanied by an order suspending sentence to which no objection was made, we would have an entirely different question. *State v. Smith* (1909), 173 Ind. 388, 90 N. E. 607. As bearing upon the question before us for consideration, see *State v. Hockett* (1907), 129 Mo. App. 639, 108 S. W. 599; *Ex Parte United States* (1916), 242 U. S. 27, 37 Sup. Ct. 72, Ann. Cas. 1917B 355; *In re Peterson* (1911), 19 Idaho 433, 113 Pac. 729, 35 L. R. A. (N. S.) 1067; *Republic of Hawaii v. Pedro* (1898), 11 Hawaiian 287.

Judgment reversed, with instruction to the Delaware Circuit Court to sustain appellant's motion to vacate the judgment, and that the appellant be discharged.

NOTE.—Reported in 121 N. E. 829. Postponement of sentence, 132 Am. St. 644, 12 Cyc 969.

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### GOODMAN ET AL. v. STATE OF INDIANA.

[No. 23,346. Filed February 12, 1919.]

1. CRIMINAL LAW.—*Appeal*.—*Evidence*.—*Weight*.—Although the evidence is conflicting and contradictory, the court on appeal will not weigh it, as it will be held sufficient if, standing alone and with the inferences drawn therefrom, it supports the judgment. p. 72.
2. CRIMINAL LAW.—*Appeal*.—*Reversal*.—*Lack of Evidence*.—A judgment will not be reversed for lack of evidence, unless some essential element of the case is wholly unsupported by evidence. p. 73.
3. CRIMINAL LAW.—*Appeal*.—*Bill of Exceptions*.—Instructions given and refused, and the exceptions arising therefrom, must

be made part of the record by special bill of exceptions in order to present for review the rulings of the court thereon. p. 73.

4. **CRIMINAL LAW.—Appeal.—Record.—Instruction Directing Verdict.**—An instruction directing a verdict in a criminal case must be made a part of the record in the same manner as other instructions in order to present questions thereon for review. p. 73.
5. **CRIMINAL LAW.—Form of Verdict.—Venire de Novo.**—In a criminal case, a motion for a *venire de novo* will not be sustained, unless the verdict is so defective and uncertain on its face that no judgment can be pronounced upon it; but the verdict, however informal, is good, if the court understands it when construed according to its reasonable intendment. p. 74.
6. **CRIMINAL LAW.—Codefendants.—Verdict.**—Where the effect of an affidavit was to charge that each defendant was guilty of an offense stated therein, and the verdict finds that the defendants are guilty as charged, a fair construction of the language is that each of the defendants is guilty as charged. p. 74.
7. **CRIMINAL LAW.—Appeal.—Review.—Reservation of Grounds.**—In a criminal case, in order to present for review the form or substance of a judgment, the question must first be presented to the trial court by a motion to modify, specifically stating the defects or mistakes complained of, and the adverse ruling thereon must be assigned as error. p. 74.

From Lake Circuit Court; *John B. Peterson*, Judge.

Prosecution by the State of Indiana against Louis Goodman and Irwin Goodman. From a judgment of conviction, the defendants appeal. *Affirmed.*

*Dwight M. Kinder*, for appellants.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

**WILLOUGHBY, J.**—This was an action by the State of Indiana against the appellants, Irwin Goodman and Louis Goodman, on an affidavit charging that appellants violated §2273 Burns 1914, Acts 1905 p. 584, §381, by buying, concealing and aiding in the concealment of certain stolen property described in the affidavit. There was a plea of not guilty. Trial by jury.

The jury brought in a verdict as follows: "We, the jury, find the defendants, Irwin Goodman and Louis Goodman, guilty as they stand charged in the affidavit; and we further find that the property described in the affidavit was of the value of \$6, and we fix their punishment at imprisonment in the county jail for a period of 30 days and that they be fined in the sum of \$500, and disfranchised and rendered incapable of holding any office of trust or profit for a period of one year."

On that verdict the court rendered the following judgment: "It is therefore considered, adjudged and decreed by the court that the defendants, Irwin Goodman and Louis Goodman, are each guilty as they stand charged in the affidavits herein of the crime of receiving stolen goods; that they each be imprisoned in the jail of Lake County, Indiana, for a period of 30 days, and that they each do make their fine to the State of Indiana in the sum of \$500, together with all costs herein laid out and expended, and that they each be and they are each disfranchised and rendered incapable of holding any office of profit or trust for the period of one year, and the sheriff of this county is charged with the due execution of this judgment."

A motion for a new trial was made by appellants, which was overruled. Also a motion for a *venire de novo* was made by each of them, which was overruled. This motion was made before the motion for new trial.

The appellants claim that the verdict was not sustained by sufficient evidence, in that they claim that the names of the persons alleged to have stolen the

1. goods in controversy are not sufficiently proved; also that the evidence does not sufficiently show that both of the defendants were guilty of the offense charged; also that the evidence fails to show the ownership of the property in controversy. These contentions must each be overruled. An examination of the evi-

dence on each of these propositions shows that it is clearly sufficient. It is true that the evidence is conflicting and contradictory on some of these points, but this court cannot weigh the evidence. Although the evidence favorable to an appellee may be contradicted and unsatisfactory, it will be sufficient if, standing alone with the inferences therefrom, it supports the judgment. *Public Savings Ins. Co. v. Greenwald* (1918), — Ind. App. —, 118 N. E. 556; *Born v. Union Elevator Co.* (1918), 67 Ind. App. —, 118 N. E. 973; *Shores-Mueller Co. v. Best* (1918), 66 Ind. App. —, 118 N. E. 688.

This court cannot reverse a case for lack of evidence where the court is not convinced that some essential element of the case is wholly unsupported by evidence.

2. *Shira v. State, ex rel.* (1918), 187 Ind. 441, 119 N. E. 833.

Appellants also claim that the court erred in refusing to give certain instructions tendered by appellants and in giving of its own motion certain instructions

3. over the objection of appellants. These instructions are not made part of the record by bill of exceptions; therefore, no question as to the giving or refusal of such instructions can now be considered in this court. Instructions given or refused in a criminal case and the exceptions arising thereon must be presented to this court for review by making them a part of the record by special bill of exceptions. *Donovan v. State* (1916), 185 Ind. 15, 111 N. E. 433; *Hahn v. State* (1916), 185 Ind. 210, 113 N. E. 725; *Donovan v. State* (1907), 170 Ind. 123, 83 N. E. 744; *Messel v. State* (1911), 176 Ind. 214, 95 N. E. 565.

An instruction directing a verdict must be made a part of the record in the same manner as other

4. instructions. *Williams v. Pittsburgh, etc., R. Co.* (1918), — Ind. App. —, 120 N. E. 46.



The appellants insist that the court erred in overruling their motion for a *venire de novo*, for the reason that the verdict in said cause is so uncertain, in-

5. definite and ambiguous that the court cannot justly enter a judgment thereon. It has been held in this state that a motion for a *venire de novo* will not be sustained unless the verdict is so defective and uncertain on its face that no judgment can be pronounced upon it. A verdict, however informal, is good, if the court understands it. It is to have a reasonable intendment and is to receive a reasonable construction, and is not to be avoided except from necessity. *Kendall v. State* (1914), 183 Ind. 162, 105 N. E. 899; *Kelley v. Bell* (1909), 172 Ind. 590, 88 N. E. 58; *Central Union Telephone Co. v. Fehring* (1896), 146 Ind. 189, 45 N. E. 64.

The effect of the affidavit in this case was to charge that each defendant was guilty of the offense named in the affidavit. The verdict finds that the de-

6. fendants are guilty as charged in the affidavit.

A fair construction of this language is that each of said defendants is guilty as charged. The court understood it that way and rendered judgment against each.

The court did not err in overruling appellant's motion for a *venire de novo*. The appellants complain that the judgment for costs is wrong, but they

7. did not make any motion in the lower court to modify it. The form or substance of a judgment cannot first be questioned in this court; but the question must be first presented in the court below by a motion to modify, which must specify wherein it should be corrected and modified, and the objection must particularly point out the defect or mistake complained of, and ask that the same be corrected. If the court rules against the party asking such correction, such ruling

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Van Natta v. Van Natta—188 Ind. 75.

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of the court below must be assigned as error in this court. Unless this is done, no objection can be made available for reversal here, however erroneous in form or substance such judgment may appear to be. *Evans v. State* (1898), 150 Ind. 651, 50 N. E. 820; *Price v. State* ( ), — Ind. App. —, 118 N. E. 690.

No error appearing in the record, the judgment is affirmed.

NOTE.—Reported in 121 N. E. 826. See under (5) 12 Cyc 689. What constitutes possession of stolen property, 101 Am. St. 505.

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VAN NATTA v. VAN NATTA.

[No. 23,240. Filed February 13, 1919.]

1. **DIVORCE.**—*Alimony.*—*Amount.*—*Discretion.*—Where there was evidence from which the court might have found that the defendant husband's property interests were worth from \$89,000 to \$115,000, it was not an abuse of the court's discretion to award the plaintiff wife \$25,000 alimony, \$25 per month for the care and custody of their only child, three years old, and \$1,800 as attorney's fees, although there was evidence tending to show the husband's property interests to be much less than either of the amounts stated. p. 77.
2. **DIVORCE.**—*Alimony.*—*Amount.*—*Discretion of Court.*—Under the evidence it was for the trial court to determine the amount and value of the defendant husband's property and, as bearing on his ability to pay alimony, the court had the right to consider the fair value of the property and to consider the defendant's age, his state of health and his earning capacity. p. 77.
3. **DIVORCE.**—*Alimony.*—*Amount.*—*Determination.*—*Discretion.*—In determining the proper amount of alimony, it was proper for the court to consider the financial situation of the plaintiff wife and the conditions surrounding her as disclosed by the evidence. p. 78.
4. **DIVORCE.**—*Alimony.*—*Discretion of Court.*—It is within the broad discretionary power of the court to determine the amount of alimony, and the court on appeal will not reverse the judgment awarding alimony unless it appears that the trial court abused its discretion. p. 78.
5. **APPEAL.**—*Harmless Error.*—*Right Result.*—Where a judgment was clearly right under the evidence, a question as to the

exclusion of evidence, though the ruling thereon by the trial court were erroneous, will not be considered on appeal. p. 78.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action for divorce by Helen S. Van Natta against Samuel G. Van Natta. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

*Kumler & Gaylord*, for appellant.

*Sheridan & Gruber* and *George P. Haywood*, for appellee.

LAIRY, J.—This was an action brought by the appellee, Helen S. Van Natta, in the Tippecanoe Circuit Court, against the appellant, Samuel G. Van Natta, seeking a divorce, alimony, custody of their only child, and compensation for her attorneys. The cause was taken to the Clinton Circuit Court on change of venue and there tried by the court. The trial court found for appellee upon the issues made, and rendered judgment dissolving the bonds of matrimony between appellant and appellee, granting the appellee a divorce from appellant, giving the care and custody of their child to appellee, and awarding appellee alimony in the sum of \$25,000, compensation for her attorneys in the sum of \$1,800, and ordered that appellant pay to the clerk of the Tippecanoe Circuit Court on the first day of each month thereafter, for the use of appellee for the care and custody of their child, the sum of \$25.

The court overruled appellant's motion for a new trial, and this ruling of the court is the only error assigned here. Appellant in his brief here discusses only two causes for a new trial. The righteousness of that part of the decree which grants an absolute divorce to appellee and awards to her the custody of the infant child is not questioned on appeal.

Appellant seeks to reverse the judgment on the ground that the amount of money that he is required to

pay under the judgment as alimony and for the support of his child is too large, and on the further ground that the court excluded evidence offered by him which, if admitted and given credit, would have diminished the distributive share of appellant in the estate of his deceased father to the extent of \$3,920.73.

At the time of the trial the estate of appellant's father was in course of settlement. The distributees of the estate consisted of a widow and six children. As

1. one of the children appellant was entitled to receive on final distribution one-ninth of the estate after the costs of administration and all debts of
2. the estate had been paid. The evidence is conflicting as to the value of the assets of the estate

and also as to the amount of the indebtedness of the estate. There was also evidence as to the value of a ranch in Texas and of the cattle and other property located thereon. There was also a question presented by the evidence as to whether the property in Texas was a part of the assets of the estate or whether it was owned by appellant and one of his brothers as equal partners. From all the evidence it was for the trial court to determine the amount and value of appellant's property. There was some evidence from which the court might have found that his property interests were worth from \$89,000 to \$115,000, while the computations made by appellant's counsel based on the evidence on which they rely would show such interests to be worth much less than either of the amounts stated; but the lowest estimate made on behalf of appellant fixes such value at about \$27,888.47. The trial court had a right to consider the fair value of the property of appellant as bearing on his ability to pay alimony and, as bearing on the same question, the court had a right to consider the age of appellant, his state of health and his ability to earn money. *Hedrick v. Hedrick* (1891), 128 Ind. 522, 26

N. E. 768; *Yost v. Yost* (1895), 141 Ind. 584, 41 N. E. 11.

In determining the proper award of alimony under the discretion vested in the trial court, it was proper for that court to consider the financial situation of

3. the wife, and the conditions which surround her, so far as disclosed by the evidence. In this case the sole responsibility of the nurture, care, control, training and education of their child, three years of age at the time of trial, was left to appellee by appellant, who, through his infatuation for another woman, had been led to renounce and repudiate every legal and moral obligation which he owed to his wife and child. The question of the amount of the alimony is one to be determined by the trial court from the evidence and the circumstances of each particular case. It is within the broad discretionary power of the trial court to determine the amount of alimony, and this court will not reverse a judgment of the trial court unless it appears that the trial court has abused this discretion.

The court does not consider the question presented with reference to the alleged erroneous exclusion of evidence. As before stated, the only effect of the

5. offered testimony, if admitted and given credit, would have been to show that appellant's interest in his father's estate was not so valuable as it would otherwise appear. In view of the other evidence in the record, the court would not be inclined to reverse the judgment even though satisfied that the ruling of the trial court on this question was erroneous. Where a judgment is clearly right under the evidence, intervening errors will be disregarded. *Watts v. Watts* (1911), 176 Ind. 334, 95 N. E. 1107; *Indianapolis St. R. Co. v. Schomberg* (1901), 164 Ind. 111, 72 N. E. 1041. The

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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record here presented requires the application of the rule just stated.

Judgment affirmed.

NOTE.—Reported in 121 N. E. 825. Nature of decree of alimony, 102 Am. St. 702. See under (1, 2) 14 Cyc 749; (3) 14 Cyc 753.

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TRAVIS, ADMINISTRATRIX, v. ROCHESTER BRIDGE  
COMPANY.

[No. 23,549. Filed February 20, 1919.]

1. **BRIDGES.—Construction.—Breach of Duty.—Contractors.—Liability.**—In the construction of bridges by the county, the primary duty to make them safe for public use is upon the county, and this primary obligation is not divested, as between it and independent contractors, by the fact that the legislature has not imposed a liability on counties for the breach thereof. p. 82.
2. **BRIDGES.—Action for Damages.—Liability of Contractor.—Acceptance by County.**—Where a county bridge, constructed by a contractor, under Acts 1899 p. 170, §5590 *et seq.* Burns 1901, was defective and, after its acceptance by the county and about five years after its construction, gave way, causing the death of the plaintiff's husband, the contractor was not liable, in the absence of a showing that its acceptance was procured through fraud or deception of the contractor, since by the acceptance the chain of causation between the contractor's negligence and the injury was broken. p. 82.
3. **NEGLIGENCE.—Manufactured Products.—Independent Contractors.—Liability.—Cases Distinguished.**—The liability of manufacturers of machinery for injuries resulting to persons not parties to the contract, on account of defects in construction, is distinguished from the liability of independent contractors for injuries resulting from defective construction of bridges or like structures, in that the manufactured product is made according to plans, and under direction, of the manufacturer, while the work of the contractor is generally done according to plans, or under supervision, of the party letting the contract. p. 83.
4. **NEGLIGENCE.—Manufactured Products.—Care Required.—Defective Articles.—Notice.**—The manufacturer of products that in their nature are not inherently dangerous when free from

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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defects owes no duty to exercise care in their manufacture for the safety of persons with whom he has no privity of contract; but where a manufactured product when sold by the manufacturer is dangerous for its intended use, to the manufacturer's knowledge, it is his duty to notify the purchaser of the defects and his failure to notify renders him liable for resulting injuries. p. 84.

5. NEGLIGENCE.—*Manufactured Products.—Liability for Injuries.*—Where the purchaser of a manufactured article not inherently dangerous accepts the article with knowledge of dangerous defects therein, the liability to third persons for injuries resulting therefrom rests upon him, and not upon the manufacturer; but the rule is otherwise if the article is inherently dangerous, regardless of the question of knowledge. p. 85.

From Marshall Circuit Court; *William B. Hess*, Special Judge.

Action by Cenia Travis, administratrix of the estate of her deceased husband, Harry Travis, against the Rochester Bridge Company. From a judgment sustaining a demurrer to the amended complaint, the plaintiff appeals. (Transferred from the Appellate Court under Acts 1901 p. 565, §1394 Burns 1914.) *Affirmed.*

*Frank E. Osborn, W. A. McVey and Lee L. Osborn*, for appellant.

*George W. Holman, Harry Bernetha and Frank E. Bryant*, for appellee.

LAIRY, J.—It appears from the amended complaint in this case that Harry Travis was killed by the falling of a bridge constructed by appellee on a public highway under contract with the board of commissioners of La-Porte county. Appellant, as his administratrix, brought this action against appellee to recover damages resulting from his death, basing her right to recover on the negligence of appellee in the construction of the bridge. The trial court sustained a demurrer addressed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This ruling is

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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assigned as error, and presents the only question to be considered on appeal.

The complaint shows that appellee as contractor constructed the bridge in question under a contract with the board of commissioners of LaPorte county in the year 1905, and that on August 27, 1910, while appellant's decedent was crossing it with a traction engine, it gave way and fell, causing injuries which resulted in his death. It is alleged that the bridge was constructed on stone abutments on each side of the stream with a floor beam in the center thereof supported by certain truss-rods, and that iron stringers were laid from the stone abutments on each side with the other ends meeting and resting on the floor beam. It is charged that appellee was negligent in failing to fasten the ends of the stringers to the floor beam and to other parts of the bridge and to each other, and that by reason of such negligent failure and omission the stringers crept and shifted from the vibrations of the bridge and finally fell from the floor beam, causing the floor of the bridge resting thereon to fall. It is further alleged that the defective and dangerous condition of the bridge was known to appellee, and that they were not known to appellant's decedent for the reason that the floor of the bridge concealed such condition from him and the public generally.

In determining the question presented by the assignment of error this court is required to decide whether or not a duty rested on appellee to use care in the construction of the bridge in favor of travelers on the highway who might use the bridge. If a duty rested on appellee to use care to protect that class of persons from injury, such duty may be asserted in behalf of appellant's decedent, and an action based on the failure to discharge the duty thus imposed. On the other hand, if the law under the facts stated imposed no duty on the



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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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contractor to use care for the safety of those who might use the bridge in traveling on the highway, then no negligence could be charged in favor of appellant's decedent.

In the construction of bridges by the county as a part of the public highways the primary duty to make them safe for the use of the public rests on the county,

1. and the fact that the legislature in this state has not imposed a liability on counties for the breach of such duty does not in any sense divest the county of such primary obligation as between it and independent contractors. At the time the contract for the building of the bridge was let to appellee by the board of commissioners of LaPorte county, the statute required that such contract should be let pursuant to notice and in accordance with a survey, profile and general plan which the statute required to be deposited with the county auditor for two weeks prior to the time the contract was let. Acts 1899 p. 170, §5590 *et seq.* Burns 1901.

The bridge did not give way and fall until about five years after it was constructed, during which time it was used by the public. The fact, as appears from

2. the complaint, that it was thrown open to the public and used for such length of time shows an acceptance by the county. The complaint does not allege that any fraud or deception was practiced by the contractor in procuring an acceptance of the bridge by the county, or that the defect was intentionally concealed so as to prevent its discovery by a proper inspection. Under such a state of facts, the liability of the contractor to the general public and persons not parties to the contract terminated at the time the bridge was accepted as completed and thrown open to the use of the public. Such act on the part of the county amounted to an intervention of an independent human agency which had the effect of breaking the chain of causation be-

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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tween any negligence of the contractor and an injury which might occur after acceptance. After acceptance of the bridge by the county, the traveler might rightly repose confidence in the county to the extent of believing that it had exercised reasonable care to provide a safe bridge for his use, but he had no right to repose such confidence in the contractor who built the bridge. *Daugherty v. Herzog* (1896), 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. 204.

The rule thus announced applies to all cases where an independent contractor constructs a building, bridge, or other structure under contract with an individual or corporation, in the absence of a showing that such fraud, deceit or intentional concealment of defects was practiced by the contractor in obtaining the acceptance as to render such acceptance ineffectual. Wharton, *Negligence* (2d ed.) §438. *Curtin v. Somerset* (1891), 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. 220; *Burdick v. Cheadle* (1875), 26 Ohio St. 393, 20 Am. Rep. 767.

In the case of *Casey v. Wrought Iron Bridge Co.* (1905), 114 Mo. App. 47, 89 S. W. 330, the contractor was held liable for negligence in the construction of a bridge to a person who was injured by the bridge falling a short time after it was accepted, on the ground that the contractor knew of the defects and knew that the bridge was dangerous at the time it was accepted, and that such defects were intentionally concealed so as to prevent their discovery by a reasonable inspection. No such question is presented in the case at bar.

Many cases have been cited by appellant involving the liability of manufacturers of machinery, conveyances and other articles sold in the regular

3. course of trade, for injuries resulting to persons not parties to the contract on account of defects in the construction of the article sold. The relations

involved in such cases are analagous to those in the case at bar, but they are not identical; and the rules of law which apply, while similar in many respects, are not the same. In the class of cases to which the one at bar belongs, the work is generally done by the contractor in accordance with plans furnished by the party letting the contract or under his direction and supervision, and the work is subject to inspection before acceptance. In the other class of cases to which reference is made, the machinery or other article manufactured is made according to the plans of the manufacturer and under his direction and subject to his inspection before sale. The differences pointed out between the classes of cases under consideration furnishes a reason for holding that the liability of an independent contractor toward third persons not parties to the contract terminates with the completion of the work and the acceptance of the contract, while a similar rule, but somewhat modified, applies to manufacturers selling in the ordinary course of trade. As affecting the liability of a contractor, the acceptance of the work by the other party to the contract operates as the intervention of an independent human agency which breaks the chain of causation so as to preclude a third party from asserting or relying on any duty on the part of the contractor to use care for his safety in the construction of the work.

It may be stated as a general rule that the manufacturer of products which in their nature are not inherently dangerous in use when free from defects,

4. rests under no duty to exercise care in their manufacture for the safety of persons with whom he has no privity of contract. *Winterbottom v. Wright* (1842), 10 M. & W. 109; *Heizer v. Kingsland, etc., Mfg. Co.* (1892), 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. 482; *Losee v. Clute* (1873), 51 N. Y. 494, 10 Am. Rep. 638; *Huset v. J. I. Case, etc., Co.*

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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(1903), 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. If, however, such a manufactured product at the time it is sold by the manufacturer is dangerous and unsafe for use for the purpose for which it is intended, and if the manufacturer knows of such defects at the time of sale, the duty rests on him to notify the purchaser of such defects. For a failure to discharge this duty the manufacturer is held liable to any person who may be injured as a result of such defect. *Lewis v. Terry* (1896), 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. 146; *Heizer v. Kingsland, etc., Mfg. Co., supra*.

The duty does not extend to the exercise of care in the manufacture of the article. The limit of the duty imposed on manufacturers of articles of this nature

5. is to give notice to the purchaser of any defect known to him which would render its use dangerous. If he discharges the duty thus imposed by notifying the purchaser of any known defects which would render the use of such article dangerous, his liability is at an end. If the purchaser accepts the article with such knowledge, the liability as to third persons rests on him. *Loop v. Litchfield* (1870), 42 N. Y. 351, 1 Am. Rep. 543; *Olds Motor Works v. Shaffer* (1911), 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560; *Logan v. Cincinnati, etc., R. Co.* (1910), 139 Ky. 202, 129 S. W. 575.

If an article not inherently dangerous is sold by the manufacturer under the belief that it is free from defects which render it unsafe or dangerous for use, he cannot be held liable for negligence in its manufacture in favor of strangers to the contract. The liability of the manufacturer of articles of the character under consideration depends, so far as strangers to the contract are concerned, on the breach of the duty which the law imposes on him to give notice to the purchaser of defects known to him which renders the article unsafe

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Travis, Admx., v. Rochester Bridge Co.—188 Ind. 79.

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for use for the purpose for which it is intended, or on some fraud or deceit on his part, or some concealment of the defect which would prevent its discovery by a reasonable inspection. *Levy v. Langridge* (1838), 4 M. & W. 337; *Woodward v. Miller* (1903), 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. 188; *Olds Motor Works v. Shaffer, supra*; *Huset v. J. I. Case, etc., Co., supra*; *Kuelling v. Lean Mfg. Co.* (1905), 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. 691, 5 Ann. Cas. 124.

The manufacturer of articles which in their nature are inherently dangerous, such as poisonous drugs improperly labeled, are held liable to strangers to the contract of sale for any injury sustained resulting from negligence in the manufacture or labeling of such articles, regardless of any knowledge of the danger occasioned by such negligence. *Norton v. Sewall* (1870), 106 Mass. 143, 8 Am. Rep. 298; *Thomas v. Winchester* (1852), 6 N. Y. 397, 57 Am. Dec. 455; *Peterson v. Standard Oil Co.* (1910), 55 Ore. 511, 106 Pac. 337, Ann. Cas. 1912A 625.

A consideration of the principles stated and the authorities cited affords a means of distinguishing the cases cited by appellant from the case at bar. The trial court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

NOTE.—Reported in 122 N. E. 1. Negligence: liability of maker of automobiles to third persons for defective construction, Ann. Cas. 1913B 689, 1917E 584. See also under (2) 29 Cyc 499; (3-5) 29 Cyc 478-484.

## VANDALIA RAILROAD COMPANY v. SCHNULL ET AL.

[No. 23,204. Filed February 21, 1919.]

1. ACTION.—*Statutory Remedies.—Exclusiveness.*—Where a statute creates a right that did not exist at common law, and for the new right a remedy is prescribed by the act, the whole matter of right and remedy is within the act and no part of either otherwise exists. p. 90.
2. CARRIERS.—*Rights of Shippers.—Common Law.*—At common law shippers were entitled to reasonable service and reasonable rates, which rights were enforceable at law and in equity. p. 90.
3. CARRIERS.—*Rights of Shippers.—Regulations.—Statute.*—The act creating the Railroad Commission, Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, does not create a new right of shippers to reasonable service and reasonable rates, but only a new remedy for an existing right. p. 91.
4. ACTION.—*New Remedies.—Cumulative.*—New remedies are cumulative and not exclusive, unless the act creating them so declares expressly or by clear implication. p. 91.
5. CARRIERS.—*Rates.—Order of Railroad Commission.—Enforcement.*—That the Railroad Commission is empowered, under Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, to enforce its orders imports neither expressly nor by implication that the parties to a proceeding by shippers, involving reasonableness of rates, may not use an order fixing rates as an element of evidence in an effort to enforce existing rights at common law. pp. 91, 92.
6. CARRIERS.—*Rights of Shippers.—Remedies.—Statute.*—The act creating the Railroad Commission and empowering it to enforce its orders, Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, does not prevent the enforcement by shippers of rights at common law or in equity, since the remedies provided in the act are cumulative and not exclusive. pp. 91, 92.
7. CARRIERS.—*Order of Railroad Commission.—Statute.—Retroactive Effect.*—Section 7 of the act of 1907 (Acts 1907 p. 454, amending Acts 1905 p. 83) did not limit the life of an order of the Railroad Commission fixing rates entered in 1906, under the act of 1905, since the amending act of 1907 was not retroactive. p. 92.
8. COURTS.—*Opinions.—Precedents.—Dicta.*—Where an opinion rests upon two distinct grounds, either of which is sufficient to support the conclusion, neither ground can be ignored as *obiter dictum*. p. 93.

9. **CARRIERS.—Regulation of Rates.—Police Power.**—Orders of the state, through the Railroad Commission, regulating the rates of carriers are an exercise of the state's public welfare power. p. 93.
10. **CONSTITUTIONAL LAW.—Police Power.—Statutes.**—The state never separates itself from the exercise of its public welfare power unless by clear expression of intention to do so. p. 93.
11. **CARRIERS. — Rates. — Orders. — Vacation. — Statute. — Construction.**—An order of the Railroad Commission, under Acts 1905 p. 83, fixing rates, did not exhaust the commission's powers and, though affirmed on appeal, the commission could have made a new order in the interest of changing needs of the public welfare, unless prevented by the act; hence an order so affirmed did not become perpetual, so as to warrant a construction of the amending act, Acts 1907 p. 454, §5433 *et seq.* Burns 1914, which limited the life of existing orders, as being remedial and retroactive. p. 93.
12. **CARRIERS.—Rates.—Reasonableness.**—A carrier is entitled to fair remuneration on all its investments and property, and for this it undertakes to reasonably serve in the capacity chosen by it. p. 96.
13. **CARRIERS.—Rates.—Reasonableness.**—If a carrier receives in the aggregate a fair remuneration, notwithstanding the rates on part of its business are not remunerative, it has no basis for complaint; hence a hearing involving fairness of rates on a part of its line is not properly confined to particular rates and actual cost in carrying the classes specified on such part of the line. pp. 96, 99.
14. **CARRIERS. — Rates. — Statutes. — Reasonableness. — Presumption.**—Legislation fixing rates is presumed to be reasonable, and this presumption prevails until all the facts showing the contrary appear, although no hearing was had before its passage, and a much stronger presumption obtains in favor of an order of the Railroad Commission, under Acts 1905 p. 83, after a trial between the parties actually interested; hence a showing by a carrier that rates over a part of its line for transporting particular classes are not remunerative is not sufficient, the burden being upon the carrier to exclude other facts bearing on the question. p. 100.
15. **CARRIERS.—Regulation of Rates.—Constitutional Provisions.**—The state is restrained by the Constitution from arbitrary action by the legislature or by agency of the Railroad Commission in fixing rates charged by carriers; but there is a wide field of discretion in the legislature or the commission. p. 101.
16. **CARRIERS.—Filing Schedule of Rates.—Effect.**—Where the Railroad Commission, prior to the passage of Acts 1907 p. 454,

§5533 *et seq.* Burns 1914, and after a hearing, made an order fixing rates for shipments of certain classes of freight over a division of a carrier's lines, the rates thereafter fixed in a schedule and filed by the carrier in accordance with such act do not govern, the carrier being bound by the commission's order. p. 101.

From Marion Superior Court; *Linn D. Hay*, Judge.

Action by Gustav A. Schnull and others against the Vandalia Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

*D. P. Williams and Pickens, Moores, Davidson & Pickens*, for appellant.

*Smith, Remster, Hornbrook & Smith*, for appellees.

HARVEY, C. J.—On December 14, 1906, the Railroad Commission of Indiana, after a hearing upon a petition of the present appellees, to which the present appellant was defendant, entered an order fixing rates for shipments of certain classes of freight over appellant's division extending from Indianapolis west to the state line.

Appellant did not appeal from said order to our Appellate Court, as the statute creating the commission authorized, but declined to comply therewith, and continued to charge appellee and other shippers of said classes of freight over said division rates higher than those specified in said order.

Appellee prosecuted in the superior court of Marion county an action for a mandatory injunction against appellant to prevent appellant from charging other than the rates so fixed. Appellee's complaint was held good, and appellant's second and third paragraphs of answer held insufficient on demurrers; and from the judgment rendered, after trial, against appellant, this appeal is prosecuted.

In support of its position that the complaint is insufficient, appellant asserts that appellees have no right to maintain this action because it is an effort to enforce



an order of the Railroad Commission, whereas the act creating such commission (Acts 1905 p. 83) and the amendatory act (Acts 1907 p. 454, §5533 *et seq.* Burns 1914) name a remedy for the enforcement of such orders (§5550 Burns 1914); and that an act creating a new right and a remedy therefor excludes all other remedies.

The rule is well established that when a right is thus created which did not exist at common law, and for that new right a remedy is by the act prescribed, the

1. whole matter of right and remedy is within the act, and no part of either otherwise exists.

The question we have is whether said rule applies to the situation here presented. If a new right was not created, all discussion of this proposition is ended.

Appellant asserts that the act of 1905, *supra*, did not give the commission any right, power or authority to institute and prosecute any action at law, or suit in equity, or any other proceeding, for the purpose of enforcing obedience to its order; but that obedience to such orders should be secured through the assessment and collection of penalties provided in the act.

Appellant asserts that this amendment, *supra*, greatly increased and added to the powers, authority and the duties of the commission, especially giving it authority and power to enforce its orders by actions at law and suits in equity in its own name, in lieu of the provisions of the act of 1905, *supra*, and that the authority and power so given the commission to enforce rate orders is exclusive of all other remedies.

At common law appellees were entitled to both reasonable service and reasonable rates. Appellees had all

2. remedies, at common law and in equity, to enforce their said rights.

The statutes under consideration do not create a new right to such service, but something more in the

nature of a new remedy for an old right. The

3. general assembly deemed it best to exercise its undoubted power of regulation and determine in a general and broad way the question as to what rates are reasonable, and for this purpose the legislature created the commission.

As the creation and empowering of the commission related to a matter of remedy for existing things which needed a remedy, the rule applies that new rem-

4. edies are cumulative and never exclusive, unless the act creating the same so declares expressly or by clear implication. *Lang v. Scott* (1825), 1 Blackf. 405, 12 Am. Dec. 257; *Chicago, etc., R. Co. v. Hall* (1893), 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

That the commission is empowered to enforce its orders, imports neither *expressly* nor by *implication* that the parties may not use an order fixing rates

5. as an element of evidence in an effort to enforce an old right.

We find in the act nothing expressly excluding other remedies, nor do we find any provision so positive as to imply a negative of other remedies. *Chicago,*

6. *etc., R. Co. v. Hall, supra; Dollar Savings Bank v. United States* (1873), 19 Wall. 227, 22 L. Ed. 80; *Fletcher v. State Capital Bank* (1858), 37 N. H. 369.

This seems especially pertinent to the present situation; these appellees procured an order or judgment of the commission, as the result of a hearing or trial, wherein this appellant was defendant, that the identical rates appellees seek to enforce for the identical classes of freight tendered for shipment, over the identical division of appellant's road here involved, are reasonable, and this order is still in force, unless it has expired by operation of law.

This order bound appellant in favor of appellees, particularly, and also in favor of all other like shippers,

and is evidence, if not conclusive evidence, against appellant of the matters thus established, available in any action by appellees to enforce appellees' old right.

We further find in the act itself (Acts 1905 p. 83, *supra*) evidence that it was not the intention of the legislature that the remedy created should be ex-

clusive—for instance §5, page 88: "In all actions between private parties and railroad companies \* \* \* brought under this law, the rates, charges, orders, rules, regulations and classifications approved or made by said commission before the institution of such action shall be held, deemed and accepted to be reasonable, fair and just." See also §§16, 18.

This suit in equity is justified by reason of the great number of transactions involving small amounts, and the fact that the commission may also, at law or in equity, enforce its orders, and that the duty of so doing is by statute imposed upon the commission, does not prevent one entitled to the benefit of an order from instituting an independent action.

We are satisfied no new right was created; an addition was created to the old remedies.

It is next insisted that the complaint is insufficient in that it seeks to enforce an order which had theretofore expired by operation of law.

In *State, ex rel. v. Vandalia R. Co.* (1914), 183 Ind. 49, 108 N. E. 97, this court determined that the act of 1907, *supra*, which prescribes that "all orders of

7. the commission, \* \* \* shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission" was not retroactive, and therefore did not limit the life of the order here in question, which was entered in December, 1906.

Appellant claims that the portion above referred to, of said opinion, is *obiter*. The opinion rests upon two distinct grounds, either of which is sufficient to 8. support the conclusion. In such case if one such element be ignored in one case as *obiter*, the other element may as justly be ignored as *obiter* when cited in another case involving such element, and the result would be an opinion all *obiter* and all ignored except the final order and mandate. That neither element can be ignored is the rule.

Counsel argue that under the act of 1905, *supra*, an order fixing rates tied the commission's hands, exhausted its powers, except as the order might be set aside on appeal, and if affirmed on appeal the order became perpetual, no matter what injustice resulted, and therefore there was a strong inducement to an amendment in 1907, *supra*, limiting the life of then existing orders as well as future orders, and that there is good reason for construing the amendment of 1907, *supra*, as remedial and intended to be retroactive.

This argument overlooks the fact that all such orders are an exercise of the state's public welfare power; and that the state never separates itself from the 9. exercise of this power unless by a clear expression of an intention to do so. We find no such expression; therefore the state might, if the facts 10. justified, have made a new order; the commission might likewise have made a new order. The spirit and life of the state's said power is that 11. circumstances change the public welfare needs, and the spirit of the commission's powers, unless limited by the act, is that it may consider such changed conditions and make orders fitting present needs. We are content to adhere to the decision holding that said act was not retroactive.

By the demurrer to the second paragraph of answer is presented the question whether it is enough for the defendant railroad company to allege and prove that the rates fixed in said order were at the time of the filing of the answer, and at the time of trial, confiscatory in that they "will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of freight described in said order."

It is asserted by appellee that in so far as the facts so alleged are material, they are provable under the general denial, and that the sustaining of this demurrer was harmless, though it be held erroneous. It is asserted by appellant that this answer controverts no allegation of the complaint, in that the complaint simply alleges that the order was entered and is in force; whereas the answer relates to the time the answer was filed and to the future, and is, in effect, an allegation that said rates are then, and will be, confiscatory, though they may not have been confiscatory when the order was entered; and that conditions arising after the complaint was filed are not provable under the general denial.

The cause was tried, and appellant's evidence tends to prove the substance of the answer, as above quoted, and no complaint is made of the exclusion of any offered evidence.

Whether, therefore, our ruling be based on appellant's construction of its answer or upon the evidence heard, we are satisfied that the defendant has not tendered or made a defense, and that the decision of the court is correct. We are led to this conclusion by the following considerations:

Appellees assert that, for all that thus appears, appel-

lant may receive sufficient net income on all its other business on this division, and on all its business, including the specified classes, on other divisions, to furnish it a fair return on all its investments and operations, including the transportation of these classes, and therefore appellant will receive all to which it is entitled, though this order be enforced. Appellee cites in support of this position the following authorities: *Smyth v. Ames* (1897), 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Minneapolis, etc., R. Co. v. Minnesota* (1901), 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Arkansas Rate Cases* (1911), 187 Fed. 290; *Minnesota Rate Cases* (1912), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Missouri Rate Cases* (1912), 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571; *Chicago, etc., R. Co. v. Railroad Commission* (1913), 152 Wis. 654, 140 N. W. 296; *Chesapeake, etc., R. Co. v. Public Service Commission* (1914), 75 W. Va. 100, 83 S. E. 286, L. R. A. 1917F 1190; *Commissioner, etc. v. Wabash R. Co.* (1901), 126 Mich. 113, 85 N. W. 466; *Seaboard Air Line Ry. v. Railroad Commission* (1913), 206 Fed. 181; *Atlantic Coast Line v. North Carolina, etc., Commission* (1906), 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *Missouri Pacific R. Co. v. Kansas* (1909), 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; *State v. Chicago, etc., R. Co.* (1911), 239 Mo. 196, 143 S. W. 785; Reeder, *Validity of Rate Regulations* 230-238.

Appellant asserts that the state has no power to thus segregate a certain class of traffic and require the railroad company to carry that traffic at unremunerative rates. Appellant cites: *Northern Pacific R. Co. v. North Dakota* (1914), 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F 1148, Ann. Cas. 1916A 1; *Norfolk, etc., R. Co. v. Conley* (1914), 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745; *Stone v. Farmers' Loan,*

*etc.*, Co. (1885), 116 U. S. 307, 331, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 630; *Northern Pacific R. Co. v. North Dakota* (1909), 216 U. S. 579, 581, 30 Sup. Ct. 423, 54 L. Ed. 624; *Minnesota Rate Cases*, *supra*, 433, 434.

There is little or no conflict in the decisions bearing upon these propositions, when principles involved are minded; but there is much confusion growing out of the application of such decisions to other cases. When the decisions cited by both appellant and appellee are read in view of the fundamental principles involved, and in view of the respective rights of the parties to each cause, such confusion almost altogether disappears.

A carrier is entitled to fair remuneration on all its investments and property. It is entitled to no more.

For this it undertakes to reasonably serve in the  
12. capacity chosen by it. It undertakes to serve for no less.

If the carrier receives in the aggregate such fair remuneration, notwithstanding the rates on a part of its business are not remunerative, the carrier has

13. no basis for complaint. *Atlantic Coast Line v.*

*North Carolina, etc.*, *Commission*, *supra*, 6, and decisions therein cited. When a rate on a part of the business is too low, some other part of the carrier's business may be paying too much, thus preventing a deficiency of income which would otherwise result from the nonremunerative rates. In such case the shippers affected by the higher rates may have a basis for complaint. *Smyth v. Ames*, *supra*, *et seq.*

If on such shipper's complaint the rates are reduced, and thus the carrier's total net returns caused to be nonremunerative, the carrier may then be entitled to complain and show the facts, and be entitled to an increase of the unfairly low rates.

It does not, however, always follow that because rates on one division are low, rates on other divisions are un-

duly high. There may be other considerations which justify the low rates, and at the same time justify the other and higher rates. *Chicago, etc., R. Co. v. Railroad Commission, supra.*

The low rates may attract business which, except for the low rates, would go to some other competitive carrier. The low rates thus add an income which would otherwise be absent, though the investment for operation existed. The necessary cost of construction and operation of a particular division may be so excessive that rates remunerative on other divisions are not remunerative as compared with such excessive costs, but are, nevertheless, an advantage for competitive purposes. Railroad companies, in the absence of prohibitive regulation, at times voluntarily fix low rates for the purposes stated, recognizing that the ultimate result is beneficial to both carrier and customer. When such is the case the reason is found in considerations and facts beyond the mere comparison of the rates with the investment and cost of operation; in other words, found in consideration of increased business, of adequate service, and the welfare of both carrier and shipper.

As shown in *Wood v. Vandalia R. Co.* (1913), 231 U. S. 1, 34 Sup. Ct. 7, 58 L. Ed. 97, this appellant fixed on some of its divisions lower rates for corresponding distances than those fixed by appellant for the same character of business, on the division here concerned; the higher rates so fixed for this division being reduced by this order. Assuming that the cost of operation and the investment are approximately the same on each division, the difference in rates made by appellant on the different divisions cannot be justified except by rebutting that assumption, or by a showing of other considerations. In other words, difference in necessary investment and facts other than income and investment



may be shown, if such facts were the basis of the carrier's voluntary action. The propriety of this view is recognized in *Minneapolis, etc., R. Co. v. Minnesota, supra*, 267, where the court approving and quoting from *Smyth v. Ames, supra*, says: "It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points." It is upon such breadth of consideration that the court continues such opinion, as follows: "While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the state Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

The same line of reasoning permits a carrier to charge more on one division than upon another; but it must allege and prove facts impeaching a commission's order cutting down the higher rate.

The principle involved is, in our opinion, strongly upheld in the decision of the federal Supreme Court in *Wood v. Vandalia R. Co., supra*, wherein the commission's order now in question was involved. In that case the present appellant sued to restrain the Indiana Railroad Commission from enforcing the order here complained of, and upon, substantially, the same allegation as to the insufficiency of the rates that are here made. Upon an appeal by the commission from an adverse decision of the circuit court of the United States, the Supreme Court held that: "Each case, as pointed out in *Smyth v. Ames*, must depend upon its special facts; and the record in the present case is barren of the necessary proof." And further: "For all that appears, the Vandalia Company might enjoy, notwith-

standing the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the state and also as to that portion to which the order referred." In said decision the lower court was reversed because the record showed that, in testing this particular order, "there was no proof of the value of the complainant's property within the State of Indiana or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all its intrastate business upon that part of its lines."

This, to say the least, is to hold that the hearing is not properly confined to the particular rates and the "actual cost and outlay" in carrying the classes

13. specified on a specified division in ascertaining whether a fair return is provided. The answer under consideration narrows the issue and omits other elements that should be considered.

As opposed to the above view appellant cites *Northern Pacific R. Co. v. North Dakota*, *supra*, which is the latest decision of the United States Supreme Court on this point to which we have been referred, or which we have found. This decision was, as was the decision in the Wood case, *supra*, written by Justice Hughes, and therefore announces corresponding principles, in so far as the same are involved.

Let it first be observed that the facts in the Dakota case were fully tried. It thus appeared that, all things considered, the state's legislative act fixing the rate was, as to two carriers of the three involved, arbitrary; that the state segregated a class of traffic—the hauling of lignite coal, which was the state's most extensive natural resource—and by legislative act the state required the railroads to carry such coal, within the state, at rates which were as to two of the carriers less than the actual

out-of-pocket expense involved, and that no compensating consideration or advantage operated in favor of the two carriers.

An effort and design on the part of the state was shown to develop this industry to the exclusive advantage of others than the carriers. The carriers did not obligate themselves to so operate. As shown by the case cited, three roads protested and were required by the state Supreme Court to submit to the rates. Two of them appealed, and the decision of the federal Supreme Court said that: "While the rate was found to be compensatory in the case of the Great Northern Railway Company (third road), this was distinctly shown to be due to the peculiar conditions of the traffic." *Northern Pacific R. Co. v. North Dakota, supra.*

As to two of the carriers, the presumption of reasonableness was by a full hearing rebutted; as to the other carrier the presumption was not rebutted. This clearly indicates that all facts and considerations having a bearing are to be heard.

The decision in the Dakota case further reads: "If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable (or in the present case unreasonable) that should be made to appear."

Legislation fixing rates is presumed to be reasonable, and this presumption holds until all the facts showing the contrary appear, though no hearing was had

14. or permitted before the passage of the *legislative act*. A much stronger presumption obtains in favor of the order of a commission after a trial between the parties actually interested, as was had in this case. Hence a showing of nothing more than that a rate does not produce a remunerative income upon the investment

in the particular property involved in transporting the particular classes over the particular division is not sufficient. The burden is upon the carrier to exclude other facts bearing on the question. *St. Louis, etc., Railway v. Gill* (1894), 156 U. S. 649, 665, 15 Sup. Ct. 484, 39 L. Ed. 567, approved in *Northern Pacific R. Co. v. North Dakota*, *supra*, 600.

The state is restrained by the Constitution from arbitrary action by the legislature or by the agency of the commission in fixing such compensation. There

15. is, however, a wide field of discretion in the legislature or such commission. One attacking a rate must exclude facts which, if they exist, show the state's action to be reasonable and within this discretion. This the appellant did not do in this case.

Appellees' demurrer was sustained to appellant's third paragraph of answer. This answer alleges that appellant filed with the Railroad Commission, in accord with the requirement of the act of 1907, a schedule of rates covering the same classes of freight and the same points of destination affected by the commission's order.

Appellant asserts that, as the amendment required such schedule to be filed, and provided that the rates in such schedule named should be lawful rates, the order of the commission was superseded by the lawful rates named in the schedule.

So far as has been pointed out, there are no decisions upon this exact situation for or against appellant's proposition. Undoubtedly, had no prior action

16. been taken by the commission, said act would apply, and rates fixed in a schedule so filed would govern until changed by the commission. But where the matter of rates covered by such schedule has been fully heard and determined by the commission prior to the filing of such schedule, and especially when the party claiming the benefit of such schedule was a party

to the hearing by the commission, and is bound by the commissioner's order, such order is not affected by the *ex parte* act of filing a schedule of other rates.

The rates fixed in the schedule here filed are not lawful rates while the commission's order remains in force.

Finding no reversible error in the record, the judgment of the superior court is affirmed.

NOTE.—Reported in 122 N. E. 225. Carriers: matters to be considered on issue of reasonable rates, Ann. Cas. 1916A 8; reasonableness of rates as affected by carrier's right to receive fair return on investment, Ann. Cas. 1913B 774; rates and rate making, reasonableness, 10 C. J. 405, 413-415; what constitutes *dictum*, Ann. Cas. 1912C 1248, 11 Cyc 755.

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### BERRY v. STATE OF INDIANA.

[No. 23,251. Filed March 4, 1919.]

1. CRIMINAL LAW.—*Appeal.—Sufficiency of Evidence.*—To present error on the ground of insufficiency of the evidence, one must show that there is a complete failure of evidence on a material issue. p. 108.
2. CRIMINAL LAW.—*Appeal.—Evidence, Weight and Sufficiency.—Credibility of Witnesses.—Alibi.—Verdict.*—The court on appeal will not weigh the evidence as to whether the accused was at the scene of the crime, where there was some evidence of his presence there at the time, since the weight of the evidence and the credibility of witnesses are questions for the jury; and where the jury found against the defendant, and the trial court denied a motion for new trial, the Supreme Court will assume that the court and jury have faithfully discharged their respective duties. p. 109.
3. WITNESSES.—*Contradictory Evidence.—Reputation of One Accused by Defendant.—Homicide.*—In a prosecution for murder, where the defendant had tried to fix guilt upon another, the state had the right to show that the defendant's story, wherein he accused the other person, was a falsehood, and in so doing could introduce testimony of the reputation for honesty and peacefulness of such person and that he had had no opportunity to commit the crime. p. 110.
4. CRIMINAL LAW.—*Evidence.—Witnesses.—Credibility.*—Where circumstances, created by the accused or by accident, point to

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Berry v. State—188 Ind. 102.

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a third person as guilty, the state may interpose defenses for such person, even though the evidence has a tendency to fortify such person as a witness. p. 110.

5. **HOMICIDE.—Weapon.—Identification.—Weight of Evidence.**—In a prosecution for murder, a hatchet found near the scene of the crime, although not discovered until several months after the offense was committed, was properly exhibited to the jury, where the evidence tended to show that the wounds inflicted on the deceased were such as could have been made by the hatchet; that nobody in the neighborhood had ever had such a hatchet; that it was found in the natural direction for the guilty party to go; that it was in such position that it might be inferred that it was not left there accidentally; and that it appeared to be new, but had a peculiar brown color on the edge; its identity having also been established by witnesses whose testimony traced it from the place of discovery into the hands of the prosecution, since the objection to such exhibit went to the question of the weight of the evidence. pp. 110, 111.
6. **HOMICIDE.—Appeal. — Harmless Error. — Reputation.**—In a prosecution for murder, the admission of testimony as to the defendant's reputation, and particularly that by the defendant's daughter that she, up to the tenth year of her life, knew nothing about her father, if error, was harmless, where there is no showing that any objection was made or exception saved to the admission thereof, and in view of other evidence of a conversation between the defendant and the chief of police, wherein the defendant made the statement, which was not disputed, that he had been in the workhouse for horse stealing. p. 112.

From Floyd Circuit Court; *John M. Paris*, Judge.

Prosecution by the State of Indiana against Edward Berry. From a judgment of conviction, the defendant appeals. *Affirmed.*

*L. A. Douglass, W. Clarke Otte*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings, Dale F. Stansbury* and *M. Z. Stannard*, for the state.

TOWNSEND, J.—Appellant was convicted of murder in the first degree, and sentenced to life imprisonment.

He claims, first, that the verdict is not sustained by sufficient evidence.

The evidence shows that Mary F. Brookbank, a widow sixty-six years old, had a home in Jeffersonville, Indi-

ana; that she had been in the habit of renting the lower part of this house and had her household goods stored in the upper part; that she was away from home a great deal; that when at home she occupied some of the rooms in the upper part of the house; that in March, 1916, the lower part of the house was unoccupied; that she was at home living alone in the upper part of the house; that she was last seen alive on Wednesday evening, March 29, 1916; that on Sunday, April 2, 1916, her body was found in the lower part of this house; that her head had been cut and crushed by numerous blows inflicted by a sharp instrument similar to a hatchet; that previous to March 29 she had complained to some of her friends that her watch had been stolen; that it was afterwards found that this watch had been pawned on March 28 in Louisville, Kentucky, to one Simon Frocht, a pawnbroker; that on the 4th or 5th day of April, 1916, Mrs. Brookbank's brother, George T. Jacobs, offered \$1,000 reward for the apprehension and conviction of the murderer; that, on April 11, appellant asked a Louisville policeman to arrest one Samuel Bottoms, and told this policeman that Bottoms had sold a pawn ticket on Fifth street in Louisville, and that the pawn ticket called for the watch of Mrs. Brookbank, who was murdered in Jeffersonville; that the policeman went with appellant and found Bottoms and took him to a boathouse where the pawn ticket had been sold; that after interviewing Bottoms and calling up the First National Bank of Louisville, to whom Bottoms referred him, Bottoms was released; that on the same day and after appellant had made this effort to have Bottoms arrested, he, appellant, went to one Mike Wall, who was chief of police of the city of Jeffersonville, and said that he knew who committed this murder, and that he wanted to get this \$1,000 reward; that he then told Wall that he had seen Bottoms and another man come from the Brookbank

premises, walking very fast, and had seen one of them throw something into a catch-basin of the sewer; that he pursued them, finally lost them; that he again, by chance, ran onto them in Louisville, saw them in front of the pawn shop, saw them with a watch on which was engraved "M. F. J."; that the watch was pawned in Louisville, at the pawn shop before mentioned, for \$5; that he saw this engraving on the watch, which was not on the outer lid but on an inner one, while he was standing a few feet away from the man who had the watch in his hand; that afterwards one of the men sold the pawn ticket to a man who kept the motorboat house; that appellant told conflicting stories to the police officers about what was on the pawn ticket, at first claiming that the initials "M. F. J." were thereon, and also how he came to know the initials on the watch, at one time claiming that he saw them on the watch, at another claiming that they were on the pawn ticket, at another that Bottoms had told him the initials on the watch.

The catch-basin in the sewer that appellant told the police about was searched, and papers, documents and keys belonging to Mrs. Brookbank were found. The evidence tended to show that appellant was in the vicinity of the Brookbank home at the time of the supposed stealing of the watch, which was sometime before March 28. The evidence also showed that he was in the vicinity of the Brookbank home on the evening of March 29, which was the night which the evidence tends to show that Mrs. Brookbank was murdered. It was the theory of the state on this evidence that appellant had committed a burglary previous to March 28, and that on March 29 he went back to commit another burglary, was discovered by Mrs. Brookbank, and that appellant murdered Mrs. Brookbank on that occasion; that the papers were thrown into the catch-basin of the sewer by him, and that his story about seeing two men going



hastily from the premises about the time the watch was lost was a mere fabrication, and that he was substituting an unknown man for himself in the course of his flight and his throwing the papers and keys into the catch-basin of the sewer; that after he found that a reward was offered for the murderer, and after the body was discovered, he became anxious to place the indicia of guilt, as to the pawn ticket and watch, on some one else; that on April 11, 1916, he came in contact with one Samuel Bottoms, who was drunk and had been on a protracted spree for several days; that he hung around with Samuel Bottoms in Louisville, and slipped into his pocket a pocketbook containing the pawn ticket in question; that when this pawn ticket was called to Samuel Bottoms' attention he sold it to the man in the motorboat house for twenty-five cents; that appellant then sought a policeman in Louisville to arrest Bottoms, thinking that he had gotten rid of the evidences of guilt and would fix this crime on Bottoms.

The evidence shows that Samuel Bottoms was a man forty-seven years old; that from the 6th or 7th of March, 1916, he was employed by a tobacco broker in Carrollton, Kentucky; that from then on during all of the days of March, and up to and including April 1 until 5 p.m., he was in Carrollton, Kentucky; that during all of this time he boarded at a hotel there and witnesses were constantly in contact with him; that on April 1 he reached Louisville at 9:30 p.m.; that he remained in Louisville at the Capital Hotel that night; that on Sunday, April 2, he was going over books with one Mr. Thompson; that a few days later he got to drinking; that on April 11, 1916, he met for the first time appellant, Berry; that he told Berry he was sick and asked if he knew a place where he could go and sit down and be quiet for a little while; that Berry said he knew a place and would go along with him; that he

told Berry he would buy a drink; that he furnished money to Berry to buy a can of beer; that he (Bottoms) walked out back of the saloon fifteen or twenty feet and looked at the river; that when he looked around Berry was sitting close to him; that he then walked up the street and Berry was around close to him; that he (Bottoms) put his hand in his right outside coat pocket and discovered a pocketbook; that he pulled the pocketbook out and wondered how he came by it; that he himself had a pocketbook but it was an entirely different pocketbook and was in his inside pocket; that he opened this pocketbook which he found in this outside pocket and discovered the pawn ticket; that Berry had said to him previously that he (Berry) had a pawn ticket, or that he was in possession of a pawn ticket, or something of that kind; that Bottoms did not remember whether he exhibited it or not; that when he (Bottoms) found this pawn ticket he went to a boathouse and sold the pawn ticket for a quarter; that the next thing Bottoms discovered, he was awakened by a policeman, who came up and hit him on the foot while he was lying asleep on the girder of a bridge; that the policeman asked him if he had a pawn ticket, or what he had done with the pawn ticket; that he told the policeman that if anything was wrong with the pawn ticket he would take him to the office where he had sold it; that he took the policeman to the office and found the ticket; that thereupon the policeman said, taking hold of his coat: "Where did you get these clothes?"; that he said: "Now here, you do not know who I am. Will you call up some reputable man? Call up Mr. Rose of the First National Bank and ask him who I am"; that the policeman called up Mr. Rose and thereupon released Mr. Bottoms. The evidence shows that while this was going on appellant Berry was present insisting that the policeman arrest Bottoms and insisting that he was the man who had

committed the Brookbank murder, because he had the pawn ticket for Mrs. Brookbank's watch. The evidence further shows in this connection that there was inscribed on an inner lid of this watch, "Pa to M. F. J." The evidence further shows that M. F. J. stands for Mary F. Jacobs, the maiden name of Mrs. Brookbank; that this watch was given to her by her father when she was a girl; this inscription on the inner lid of the watch was such that one who had defective eyesight could not read it. Appellant first claimed that he read this inscription looking over the shoulders of the two men who were standing in front of the pawn shop, one of whom afterwards pawned the watch. But it transpires from the evidence that appellant is a man about sixty-four years old, who cannot read a newspaper without glasses. It also transpires from the evidence that the watch was pawned in the name of Charles Jacobs, and that Charles Jacobs was a son of William S. Jacobs, who in years past had operated a coal yard in Jeffersonville; that appellant had worked in this coal yard when he was a boy and was acquainted with Charles Jacobs; that Charles Jacobs had been dead for a number of years; that appellant knew that Charles Jacobs was dead; that there was no other Charles Jacobs in that vicinity; that Samuel Bottoms did not know the Jacobs family, was not acquainted in Jeffersonville, had not been there for twenty years, until he was on a drunken spree in Louisville, Kentucky, the week following April 2, and was not then in Jeffersonville until Sunday, April 9, when he went over to get a drink in a saloon.

It is incumbent upon the one asserting that a verdict is not sustained by evidence to show that there is a complete failure of evidence on some material

1. issue. The nearest that we can come to finding any specific thing in appellant's brief on which

counsel are basing their claim is that appellant interposed an alibi, and that therefore it was incumbent upon the state to break down this alibi by showing appellant's presence at the scene of the crime. The evidence of the colored janitor at the church, which was in the same block and just back and to the west of the Brookbank property, shows that appellant was in the vicinity on the evening of March 29. Appellant's counsel seem to think that it is for us to weigh this evidence. This we cannot do. The jurors are the best judges of the credibility of witnesses, and when the jury has found a verdict against appellant, and the trial court has overruled a motion for a new trial, we must assume that they have faithfully discharged their respective duties. The verdict is sustained by sufficient evidence.

It is next contended by appellant's counsel that the court erred in permitting the state, as a part of its original case, to prove the general reputation of Samuel Bottoms for peaceableness and honesty in the community where he resided, because counsel say that this is bolstering up a witness before he testifies. The question the state had to meet was: "Did Samuel Bottoms commit the crime?" The theory of the state was that appellant had foisted upon Samuel Bottoms, in his drunken condition, the indicia of guilt, and had woven a tissue of falsehood about him. The evidence in this case tended to show that the appellant placed in Samuel Bottoms' pocket the pawn ticket in question, and it did show and was admitted that on April 11, 1916, appellant called the attention of a Louisville policeman to Samuel Bottoms and insisted on his arresting him because, as appellant said, he had committed the Brookbank murder. It must be remembered that on this very day, April 11, after trying to have Bottoms arrested by a Louisville policeman, appellant told his story to the chief of police

of Jeffersonville, in which he claimed that during the latter part of March he had seen two men (one of whom was Bottoms) hastily leaving the vicinity of the Brookbank house, and had pursued them on foot and inter-urban, and finally lost them and again came upon them by chance in Louisville. Though the body of Mrs. Brookbank was discovered on April 2, and it was at once generally known in Jeffersonville that she had been murdered, yet appellant disclosed to no one his suspicions and his knowledge until April 11, the very day that Bottoms claims appellant first came in contact with him.

The state had a right to show that appellant's story was false, and, as a part of this falsehood, that he was attempting to fix guilt upon one who had no op-

3. portunity to commit the crime, and also upon one whose reputation for peaceableness and honesty was such that he would not do such a thing if he had an opportunity. *Kidwell v. State* (1895), 35 Tex. Cr. R. 264, 33 S. W. 342.

Where circumstances, created by the accused or by accident, point to a third person as guilty, the state may interpose defenses for such third person,

4. even though such evidence has a tendency to fortify such third person as a witness. *Bram v. United States* (1897), 168 U. S. 532, 568, 18 Sup. Ct. 183, 42 L. Ed. 568.

It is further insisted by appellant that the court erred in admitting in evidence, for the inspection of the jury, a hatchet which was found between two wood-

5. sheds on top of some lumber.

These two sheds were on adjoining lots and were only a few inches apart. In between them had been thrown lumber and old scantling that had been lying there for some time. These two sheds were on an alley in the block in which the Brookbank house is located. They were in a direction that one who had committed

the crime would naturally flee. A boy eight years old was playing on the roof of these sheds in the month of July, 1916, and discovered a hatchet lying on this lumber, with the edge down between the boards and the hammer part of the hatchet up. This boy called the attention of his grandfather to the hatchet; the grandfather told him to let it alone, that it belonged to one of the neighbors; that afterwards, on July 11, the boy again called it to the attention of a neighbor woman and she told him to get it, that she had lost a hatchet. He got it and it turned out to be a peculiar hatchet with a short handle and ball-shaped hammer, and ordinary hatchet edge, and, as this witness described it, it had a peculiar brown on the edge; that a part of the hatchet looked bright and new, indicating that it had not been used much; that this hatchet was turned over to a fireman across the street; that he turned it over to the chief of police; that the chief of police identified it as being the hatchet received from the fireman, the fireman identified it as being the hatchet received from the woman; that the woman and the boy identified it as being the hatchet taken from the lumber pile between the sheds.

This was sufficient identification, so far as where the hatchet came from is concerned; but we understand appellant's counsel to contend that, because the mur-

5. der was committed on March 29, and this hatchet was not discovered until July 11, it is too remote in time, and therefore it was improper to introduce it before the jury. It must be remembered in this connection that it was shown that nobody in the neighborhood had ever had such a hatchet. It must be remembered in this connection that all the persons who testified concerning the wounds inflicted on the head of Mrs. Brookbank testified that they were cuts and crushings of the skull that could have been produced by such

an instrument as this; and it must be remembered that the evidence shows that where this hatchet was found was in the natural direction for one to go who had committed this crime. It must further be remembered that it was in a position on the lumber between these two sheds from which it might be inferred that it was not left there accidentally. Therefore counsel's objection goes to the weight of this evidence rather than to its admissibility. The court committed no error in admitting this evidence.

It is next insisted that the court erred in admitting certain evidence concerning the reputation of appellant in Jeffersonville and vicinity, and particularly in

6. permitting the state to show by a daughter of appellant that she, up to the tenth year of her life, did not know anything about her father.

It is not shown that any objection was made or any exception saved in this behalf. If there was any error here, we think it was harmless.

When appellant had the interview with the chief of police on the afternoon of April 11, that conversation was introduced by the following colloquy:

"Berry: Do you know me?

"Chief: Yes. It is Ed Berry.

"Berry: I would not have known you, Mike.

"Chief: I know you. When did you get out?

"Berry: Where?

"Chief: The penitentiary.

"Berry: I was not in the penitentiary. I was in the workhouse for horse stealing."

Although appellant took the witness stand and disputed some of the evidence given by the chief of police, as to a conversation with this officer on that date, yet the fact in the colloquy above set out stands undisputed, even by appellant. In view of this commentary uttered by appellant on his own character brought down to this time, we feel that, even if there was any error in the

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Lake Erie, etc., R. Co. v. McFarren—188 Ind. 113.

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evidence reflecting upon the character and reputation of appellant, it was harmless.

We are convinced that appellant had a fair trial and was properly convicted. The judgment of the trial court is therefore affirmed.

**NOTE.**—Reported in 122 N. E. 324. Alibi, sufficiency of evidence, 8 Ann. Cas. 1189, 12 Cyc 383. Defendant as witness, credibility, impeachment by proof of other offenses, 105 Am. St. 1005, 12 Cyc 405, 406. See under (6) 12 Cyc 818.

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**LAKE ERIE AND WESTERN RAILROAD COMPANY  
v. MCFARREN.**

[No. 23,290. Filed March 4, 1919.]

1. **RAILROADS.—Crossing Accident.—Contributory Negligence.—Jury Question.—Signals.**—In an action for injuries sustained by the plaintiff at a railroad crossing, where the view of the track was obstructed and a gong had been installed to give warning of approaching trains, the plaintiff having knowledge of the gong and its purpose, it was not contributory negligence, as a matter of law, for the plaintiff, in approaching the crossing, to act on the assumption that the defendant would not violate an ordinance relative to speed and the giving of signals, nor to assume that the gong would be kept ringing when trains approached, the question being one of fact for the jury. pp. 116, 118, 124.
  2. **APPEAL.—Review.—Weight of Evidence.**—The Supreme Court, when the evidence is conflicting, will consider only the evidence tending to support the verdict. p. 116.
  3. **RAILROADS.—Crossing Accident.—Contributory Negligence.—Burden of Proof.**—In an action against a railroad company for injuries sustained in a crossing accident, contributory negligence on the part of the plaintiff is a matter of defense, under Acts 1899 p. 58, §362 Burns 1914, and, in the absence of evidence on the subject, the jury's finding on that issue must be for the plaintiff, since the burden of proof thereon is upon the defendant. p. 116.
  4. **NEGLIGENCE.—Contributory Negligence.—Questions for Court and Jury.**—In personal injury cases, the question of the plaintiff's contributory negligence is for the jury, unless upon the
- VOL. 188—8



controlling facts reasonable minds can come to but one conclusion, in which event the question is one of law for the court. p. 117.

5. TRIAL. — *Instructions. — Construing Together.* — Instructions must be construed together, and if the instructions, when so construed, state the law correctly, and in such manner as not to be misleading, there is no error, though one or more of the instructions considered separately might be incomplete or misleading. p. 119.

From Adams Circuit Court; *David E. Smith*, Judge.

Action by Joseph McFarren against the Lake Erie and Western Railroad Company. From a judgment for the plaintiff, the defendant appeals. (Transferred from the Appellate Court under Acts 1901 p. 590, §1405 Burns 1914.) *Affirmed.*

*Walter Olds and John B. Cockrum*, for appellant.

*Peterson & Moran and Frank W. Gordon*, for appellee.

WILLOUGHBY, J.—Appellee sued appellant for damages on account of an injury alleged to have occurred at a street crossing in the city of Bluffton, Indiana, on account of alleged negligence of appellant. The complaint was in three paragraphs and issues were formed on each paragraph by general denial. Trial by jury and verdict for appellee in the sum of \$2,500. Appellant filed a motion for new trial, and the court, after requiring appellee to enter a remittitur for \$500, overruled such motion.

The only errors assigned by appellant and not waived are: 1. The verdict of the jury is not supported by sufficient evidence and is contrary to law. 2. The court erred in giving instruction No. 7 at request of appellee. 3. The court erred in giving instruction No. 8 at request of appellee.

The evidence shows substantially the following facts: That on the morning the accident occurred, appellee, together with Hugh Rowe, had gone to the F. L. Mercer Lumber Company for lumber; that, as they went across

appellant's right of way, they observed the gong at the crossing, both of whom were acquainted with the purposes of the same. The gong was an alarm bell on a pole near the railroad at the intersection of the railroad crossing and Wabash street, used to give warning to persons passing along Wabash street, over appellant's tracks, of the approach of locomotives or trains to the crossing; that they procured their load of lumber, and came out of the yard immediately west of the railroad company's right of way and track, and the appellee, together with Mr. Rowe, stopped at said point, and looked and listened for the approach of trains to said crossing, and then drove their team to the south of the center of the street so that they would both be in a position to see the gong and determine from sight whether or not the same was ringing, as well as to determine said fact by hearing; that they approached, looking and listening for said train, and listening for the ringing of said gong; that said gong was not ringing; that on the south side of said railroad crossing and immediately west of the switch adjacent to said main track was a large elevator, and immediately east of said elevator was a box car which prevented appellee from having a clear view to the south; that he watched to the south and looked to the south until he got in a position so that he was able to see that there was no train coming from the south, at which point he was eight or ten feet west of appellant's main track; that he then looked to the north and discovered a locomotive coming from that direction running backward at a rate of speed of from eight to fifteen miles an hour. On the north side of the street west of appellant's tracks and switch at said crossing was the F. L. Mercer Lumber Company's office. Immediately east of the F. L. Mercer Lumber Company's office there was a warehouse. Immediately east of the warehouse was a coal shed, and immediately east of the

coal shed was a box car on the switch, which box car extended over the sidewalk onto the street, and which prevented Mr. Rowe and Mr. McFarren from seeing to the north as they approached said crossing. The street between the switch and the main track of appellant is down grade about one foot to eighteen inches. An ordinance of the city of Bluffton providing that locomotives shall not be run at a faster rate of speed than six miles per hour within the city limits, and providing for the continuous ringing of the bell on a locomotive from the time the locomotive enters the city limits until it leaves the city limits was read in evidence.

The appellee contends that upon these facts the question of contributory negligence was for the jury to determine, and, if found in favor of appellee on

1. that question, this court should not disturb the finding.

The appellant insists that upon the foregoing facts the plaintiff was guilty of contributory negligence as a matter of law, and consequently could not recover, and asserts that the evidence shows this crossing to be a very dangerous one, and that it was not only the duty of plaintiff to stop, look and listen, but that he should have stopped his team and gone ahead to look for approaching trains before attempting to cross, and his failure to do so established his negligence as a matter of law.

This court will not weigh the evidence, and when the evidence is conflicting, will consider only such evidence as tends to support the verdict. The burden is

2. upon the defendant to prove contributory negligence. But in determining that question all the evidence in the case will be considered whether
3. introduced by the plaintiff or the defendant. The appellant contends that, in order for the appellee to recover in an action of this kind, it must appear from

the evidence that he was free from contributory negligence. That is not the law, since the act of 1899 (Acts 1899 p. 58, §362 Burns 1914) provides that contributory negligence on the part of the plaintiff shall be a matter of defense. The law now is that, if there is no evidence on the subject of contributory negligence of the plaintiff, the finding must be against the defendant on that issue because the defendant has the burden of proof. In the case of *Grand Trunk, etc., R. Co. v. Reynolds* (1910), 175 Ind. 161, 92 N. E. 733, 93 N. E. 850, the court said: "If a traveler is injured at a railway crossing, there is no presumption, in the absence of evidence, either for or against negligence. The traveler is not aided by a presumption of freedom from fault, nor the railway by a presumption of contributory negligence. It is simply a failure of proof upon the part of the railway as to an issue, the burden of showing which is by statute cast upon it." In the case of *City of Indianapolis v. Keeley* (1906), 167 Ind. 516, 79 N. E. 499, it is held that, where contributory negligence is relied upon in personal injury cases, "each party charged the other with negligence under the issues joined, and the alleged negligence of each was a matter for the determination of the jury from all the facts and circumstances given in evidence, unaided by any presumption of law in favor of or against either party."

If there is any dispute as to the controlling facts on the question of contributory negligence, and if there is any room for different conclusions by reason-

4. able men, then the question of contributory negligence is one of fact for the jury. *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612; *Buehner Chair Co. v. Feulner* (1904), 164 Ind. 368, 73 N. E. 816. It is only where there is no dispute as to the controlling facts, and no room for different conclusions upon the part of reasonable minds as to the ques-

tion of contributory negligence, that it becomes a question of law for the court. *Buehner Chair Co. v. Feulner, supra.*

In *Wabash R. Co. v. McNown* (1912), 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383, it is held that, though a railroad company is not required to keep or maintain an electric bell at a crossing, yet, if it had voluntarily kept and maintained one, the traveling public had a right to rely upon it to the extent of presuming that it would correctly indicate the danger or serve the warning which it was intended that it should give.

In a case similar to the one at bar the court said: "The case before us belongs to the class in which railroad companies are held responsible because they put the traveler off his guard and lure him into danger. The general rule upon this subject is thus stated by one of our text-writers: 'Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the necessity for looking or listening for the approach of a train, he cannot as a matter of law be said to be guilty of negligence *per se* for neglecting to do so. Thus, where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross, and if the company neglects its usual duty, and does not close them, or otherwise notify travelers of the approach of a train, it cannot relieve itself from liability simply because the traveler neglected to look or listen for himself.'" *Pennsylvania Co. v. Stegemeier, Adm.* (1889), 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136.

In the case at bar the plaintiff knew of the gong, and the purpose for which it was kept, and he had a right to assume that it would be ringing if a train was

1. approaching in close proximity, and he also had

a right to assume that the defendant's servants would not violate the city ordinance relative to speed or the ringing of the bell on said locomotive. Under the circumstances as shown by the evidence, the court cannot say, as a matter of law, that the plaintiff was guilty of contributory negligence, but the question of his contributory negligence was a question of fact for the jury to determine from the evidence. In this case the jury found that the plaintiff was not guilty of contributory negligence, and we are not warranted in disturbing such verdict.

Appellant insists that the court erred in giving instructions Nos. 7 and 8, given at request of appellee.

In considering this question we must look to all

5. the instructions given in the case. A charge to the jury must be considered as a whole. Instructions must be taken and considered together, and not in dissected parts, and if all the instructions when taken together and construed together state the law correctly and in such manner as not to mislead the jury, there is no error, though one or more of said instructions considered by itself might be incomplete, or misleading to the jury.

Instruction No. 7, given at request of appellee, is as follows: "If you find from the evidence that at the time in controversy in this case there was in force an ordinance in the city of Bluffton, making it unlawful for a railroad company to run a locomotive engine in such city, at a greater rate of speed than six miles per hour, if you further find from the evidence that at the time in controversy in this case there was in force an ordinance in the city of Bluffton, making it unlawful for a railroad company to run a locomotive engine in such city without ringing the bell during the time in which said locomotive engine was in operation, then I instruct you that the plaintiff had a right to presume and rely

upon said presumption that the defendant in running its locomotive engine in the city would not run it in violation of the provisions of the ordinance.

"I instruct you that the plaintiff in this cause had a right to presume that the defendant would obey the said ordinance and cause the bell attached to its locomotive to be rung as its locomotive approached the said crossing. I instruct you that the plaintiff had a right to presume that the defendant would obey said ordinance and would not operate its locomotive over its railroad tracks within the incorporate limits of the city of Bluffton, at a greater rate of speed than six miles per hour. Whether or not the bell was rung is a question of fact for you to determine; whether or not said locomotive was operated over said railroad tracks within the incorporate limits of the city of Bluffton at a greater rate of speed than six miles per hour is a question of fact for you to determine. If you find from the evidence that the bell was not rung, and if you further find from the evidence that said locomotive was operated over the railroad tracks within the incorporate limits of the city of Bluffton at a greater rate of speed than six miles per hour, then I instruct you that in determining the question as to whether or not the plaintiff was exercising reasonable care in approaching the crossing, you may consider that he had a right to presume that a warning would be given him of the approach of the locomotive to the crossing by the ringing of the bell; and that the locomotive approaching the crossing was not being operated at a greater rate of speed than six miles per hour."

This instruction states the law correctly on the particular questions to which it directs the attention of the jury.

Instruction No. 8, given at request of appellee, is as follows: "If you believe from the evidence that the

plaintiff was at the time of the accident familiar with the railroad and street crossing where the accident occurred; that he knew that there was an alarm bell on a pole near to the railroad at the intersection of the railroad crossing and Wabash street, used to give warning to persons passing along Wabash street over defendant's tracks, of the approach of locomotives or trains to the crossing, and knew that this bell when sounded was sounded by some person or persons or was sounded automatically as a train or locomotive approached said crossing, then I instruct you that if said bell or gong was not sounded that the plaintiff had a right to rely upon the fact that no train or locomotive was coming from either direction over said track close to said crossing."

This instruction is correct as far as it goes, and, when read in connection with No. 14, given at appellant's request, states the law fully and correctly. It is not clear from appellant's brief just what objections are urged to said instructions Nos. 7 and 8, given at request of appellee. The appellant in its brief says that instruction No. 7 states in substance that the plaintiff had a right to presume that, if no electric gong was sounding or whistle blowing or bell ringing, no train was approaching, and in determining if the plaintiff used reasonable care in approaching the crossing that he had the right to presume that a warning would be given of the approach of a train, and that the failure to give signals of the approach of a train to a highway crossing does not relieve a traveler on the highway of the duty to use diligence to learn of the coming of a train.

In regard to instruction No. 8, appellant says that this instruction states that: "If the plaintiff knew there was a bell or gong near the crossing which gave the alarm when a train approached, he had the right to rely upon the fact that no train was approaching if the bell



or gong was not sounding, and says that failure on the part of a flagman on a highway crossing to warn persons of the approach of trains does not excuse such persons from exercising care and caution to learn of the approach of trains before they attempt to cross a railroad track, and that the fact that the automatic gong did not sound will not so relieve one about to cross a railroad track." It is barely possible that the jury might have been misled by the language used in these instructions, if it were not for the fact that the court gave instruction No. 14 of appellant's instructions, which is as follows: "The fact that a railroad company maintains warning bells at a railroad crossing and at a time when trains approach such crossing the bells are not rung, or gives no warning, does not excuse a traveler approaching the crossing from exercising diligence for his own safety and looking and listening for trains in all directions from which they might approach to avoid a collision therewith and if he fails to exercise such diligence, notwithstanding the bells are not ringing, or gives no warning, if by the exercise of diligence in looking and listening he could have ascertained that a train was approaching and avoid a collision therewith and he fails to do so, he is guilty of negligence and if injured, cannot recover."

It will readily be seen that this instruction, taken with instructions Nos. 7 and 8, complained of by appellant, obviates the objections that appellant has set forth in its brief, and the jury could not in the least be misled by these instructions taken together, both of which were given to the jury trying said cause. Instructions Nos. 7 and 8, given at request of plaintiff, are practically the same as instructions approved by this court in similar cases.

In *Evansville, etc., R. Co. v. Berndt, supra*, we find the following statement: "Complaint is made of instruc-

tion one, given at the request of appellee, which advised the jury that if it was the custom of appellant to close its gates at the William street crossing when an engine or train of cars approached, and decedent was familiar with that custom, and when he approached he found the gates open and no warning was given that it was unsafe to cross, he had a right to presume no locomotive or train was approaching and that it was safe to cross appellant's tracks. This instruction, so far as it goes, embodies a declaration of law approved by this court, and was not erroneous." *Pennsylvania Co. v. Stegemeier, Admx., supra*; *Indianapolis Union R. Co. v. Neubacher* (1896), 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; *Railway Co. v. Schneider* (1888), 45 Ohio St. 678, 17 N. E. 321; *Lindeman v. New York, etc., R. Co.* (1887), 11 N. Y. St. Rep. 837; *Fitzgerald v. Long Island R. Co.* (1887), 10 N. Y. St. Rep. 433; 2 Wood, Railway Law 1328. In the same case, *Evansville, etc., R. Co. v. Berndt, supra*, the court said: "The third instruction was similar in substance, with the additional statement, that in such circumstances the open gates were an affirmative assurance that there was no danger, upon which the traveler by exercising ordinary care might act without being chargeable with negligence. This instruction is supported by the authorities, and was not erroneous." *Nichols v. Baltimore, etc., R. Co.* (1904), 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; *Central Trust Co. v. Wabash, etc., R. Co.* (1886), (C. C.) 27 Fed. 159; *Delaware, etc., Co. v. Larnard* (1908), 161 Fed. 520, 88 C. C. A. 462; *Schulte v. Louisville, etc., R. Co.* (1908), 128 Ky. 627, 108 S. W. 941. In *Wabash R. Co. v. McNown, supra*, 125, the law is stated to be that: "Though not required to keep or maintain such electric bell, yet appellant having voluntarily kept and maintained the same, at said crossing in question, the traveling public had a right to rely upon it to the extent of presuming

that it would correctly indicate the danger or serve the warning which it was intended that it should give." *Pennsylvania Co. v. Stegemeier*, *Admx.*, *supra*; *Cleveland, etc., R. Co. v. Heine* (1901), 28 Ind. App. 163, 62 N. E. 455; *Cleveland, etc., R. Co. v. Coffman* (1902), 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179. The failure of defendant's gong to give warning, and failure of defendant to ring the bell on said locomotive raised the presumption of safety. In *Cleveland, etc., R. Co. v. Schneider* (1906), 40 Ind. App. 38, 46, 80 N. E. 985, we find this statement of the law: "The failure of appellant's signal to give warning raised the presumption of safety. That fact was important, at least upon the question of appellee's contributory negligence." *Pittsburgh, etc., R. Co. v. Yundt* (1881), 78 Ind. 373, 41 Am. Rep. 580; *Cleveland, etc., R. Co. v. Heine*, *supra*; and cases cited; *Sweeny v. Old Colony, etc., R. Co.* (1865), 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Bonnell v. Delaware, etc., R. Co.* (1877), 39 N. J. Law 189; *Union Pacific R. Co. v. Henry* (1887), 36 Kan. 565, 14 Pac. 1; 3 Elliott, Railroads (2d ed.) §1157; *Cleveland, etc., R. Co. v. Coffman*, *supra*.

From the facts detailed in the case at bar, it was for the jury, under proper instructions from the court, to determine with whom the responsibility, under

1. the law, rested for the injury to the plaintiff. It was not negligence as a matter of law on the part of appellee to act on the assumption that appellant would not violate the ordinances of the city of Bluffton relative to speed or the ringing of the bell on said locomotive, and he had a right to act on the presumption that the gong used by the railroad company to give warning to persons passing along Wabash street, over appellant's tracks, would be kept ringing when a train was coming close to said crossing. We think the in-

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Oilar v. Oilar—188 Ind. 125.

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structions as a whole stated the law clearly and correctly.

Judgment affirmed.

NOTE.—Reported in 122 N. E. 330. Negligence: contributory, burden of proof, 10 Ann. Cas. 4. Railroads: failure to give statutory signals at crossings as excuse for traveler's contributory negligence, 6 Ann. Cas. 78, Ann. Cas. 1918D 388; failure to stop, look and listen at crossing as negligence *per se*, 1 A. L. R. 203; duty of company to persons approaching tracks, 20 Am. St. 114. See under (1) 33 Cyc 941-946; (4) 29 Cyc 645.

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OILAR ET AL. v. OILAR.

[No. 23,107. Filed November 19, 1918. Rehearing denied March 6, 1919.]

1. **WILLS.—Codicil.—Republication.—Contest.—Burden of Proof.**—In an action to have a will and codicil declared invalid, the contestant has the burden of establishing the invalidity of both instruments, since the codicil, if valid, serves to republish the original will except as modified by the codicil. p. 127.
2. **WILLS.—Contest.—Testamentary Capacity.—Evidence.—Conflict.**—In an action by a daughter to contest her father's will, which stated that she had been provided for by prior advancement, evidence tending to show that the testator's health failed following an operation and his memory weakened, that it was difficult for him to turn his mind from one subject of conversation to another or to readily grasp matters explained to him, that the relations between the father and the daughter had been friendly, and that certain land deeded to the daughter had been purchased by the testator with money held by him as her guardian, was sufficient, as against objection raised in the Supreme Court, to warrant the jury in inferring that the testator did not understand the provision made for the plaintiff, though only three witnesses gave opinions that the testator was of unsound mind when the will was executed and the facts upon which the opinions were based rendered them of little, if any, probative force, since the court on appeal will not set aside a verdict that is against the preponderance of the evidence, such duty being that of the trial court upon proper presentation of the question. p. 127.
3. **APPEAL.—Review.—Conflicting Evidence.**—The court on appeal will not weigh conflicting evidence. p. 128.

4. **WILLS.—Contest.—Admission of Evidence.—Harmless Error.**—In an action to contest a will upon the grounds of mental incapacity and undue influence of the testator, the admission under the latter issue of the declaration of a defendant legatee that “the will was made to suit her” was harmless error, where there was sufficient evidence to sustain the jury’s finding that the testator was of unsound mind. p. 129.
5. **WILLS.—Contest.—Admissibility of Evidence.**—In a will contest, statements alleged to have been made by the testator concerning the provision he intended to make for the plaintiff in his will were properly admitted in evidence to show the testator’s mental condition under an instruction limiting them to such purpose. p. 129.

From Miami Circuit Court; *Charles A. Cole*, Judge.

Action by Nellie Oilar against Elizabeth Oilar and others. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

*R. J. Loveland, D. G. Ridenour, James C. Blackledge, Conrad Wolf and Earl B. Barnes*, for appellant.

*Albert Ward and Bell, Kirkpatrick & Voorhis*, for appellee.

**SPENCER, J.**—Appellee instituted this action to have declared invalid a will and codicil alleged to have been executed by her father, Henry C. Oilar, under which appellants would receive the entire estate of the testator. A general verdict for appellee was upheld by the circuit court in overruling appellants’ motion for a new trial, and all of the questions presented for our consideration arise out of the attack on that ruling. The complaint avers: (1) That the alleged will of the testator, dated November 25, 1908, and the codicil thereto, dated September 4, 1912, were each procured through the exercise of undue influence; and (2) that on each occasion the testator was of unsound mind, but appellants earnestly contend that no part of such charge was sustained by the evidence introduced at the trial.

A preliminary contention is made that, if the will in

suit is valid, appellee would have no right to contest the codicil which purports only to name a new exe-

1. cutor and to separate into several tracts certain lands which were previously devised to appellants as a common estate. There is no occasion here to dispute this contention, but, as the execution of the codicil, if valid, served to republish the original will except as modified (*Manship v. Stewart* [1913], 181 Ind. 299, 301, 104 N. E. 505; *Barnes v. Phillips* [1915], 184 Ind. 415, 416, 11 N. E. 419), the burden rested on appellee to establish the invalidity of both instruments before she was entitled to a verdict.

We are required, then, to determine whether the evidence is sufficient to sustain the finding of the jury as to each instrument. Only three witnesses expressed

2. an opinion that Henry Oilar was of unsound mind on November 25, 1908, and appellants earnestly insist that the facts stated by each of said witnesses as a basis for his opinion show clearly that the testator then had mind sufficient to know and understand the business in which he was engaged, the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and that he could keep all of these things in mind long enough to form a rational judgment concerning them. Under such circumstances, if conceded to be true, the opinions of the several witnesses possessed little, if any, probative value, but appellants' contention that the verdict of the jury must therefore be set aside rests on the erroneous assumption that the record contains no other evidence of unsoundness of mind on the part of Henry Oilar at the time the alleged will was executed. There is testimony to the effect that after Mr. Oilar underwent a serious operation in the year 1903, his health gradually failed and his memory became weakened and uncertain; that it was difficult for him to turn his mind from one

subject of conversation to another, and that he did not readily grasp matters which were explained to him. The will states that at the time of its execution the testator had already advanced and given to appellee all of the interest in his estate which he desired her to have, but there is other evidence tending to show that certain land which he had previously deeded to appellee was purchased with her money which he had in his possession as guardian, and that she had received her education out of the income from that farm. The personal relations between father and daughter were shown to have been pleasant and, on consideration of the entire record, we cannot say that the jury was unwarranted in drawing the inference that the testator's mental condition at the time the alleged will was executed in 1908 was such that he did not clearly understand what provision had been or was being made for appellee. The evidence is unsatisfactory in many particulars, but it is not without conflict, and in cases of that character the duty rests on the lower court, whenever the question is properly presented and the verdict of the jury is against the preponderance of the evidence, to exercise some moral courage and set such verdict aside, rather than to endeavor to cast the responsibility on this court, which has no such power. *Deal v. State* (1895), 140 Ind. 354, 356, 39 N. E. 930; *Christy v. Holmes* (1877), 57 Ind. 314, 316.

Much of the evidence tending to show mental incapacity at the time the codicil was executed is of a character similar to that already considered, but it is

3. supplemented by the testimony and opinions of other witnesses who knew the testator during the later years of his life and believed him then to be of unsound mind. On this issue, also, we are required to sustain the verdict of the jury under the familiar rule that an appellate tribunal cannot weigh conflicting evi-

dence. *Pence v. Myers* (1913), 180 Ind. 282, 285, 101 N. E. 716.

Our conclusions concerning the evidence on the issue of mental incapacity render it unnecessary to consider in detail the proof which tends to sustain the

4. charge of undue influence, but in this connection appellants contend that the trial court erred in admitting in evidence certain declarations alleged to have been made by appellant Elizabeth Oilar to the effect that "the will was made to suit her." Whatever value, if any, this evidence had as proof, under either of the issues here presented (*Ryman v. Crawford* [1882], 86 Ind. 262, 267), in view of the presence in the record of evidence sufficient to sustain the express finding of the jury that the testator was of unsound mind, the admission of the alleged declarations, even if erroneous, would not be reversible error.

Objection is also made to the admission in evidence of certain statements alleged to have been made by

Henry Oilar concerning his will and the provision which he intended to make for appellee.

These statements were properly received for the purpose of showing the mental condition of the testator (*Lamb v. Lamb* [1886], 105 Ind. 456, 459, 5 N. E. 171), and the jury was expressly instructed that they should be considered for no other purpose.

The giving and refusal of several instructions are challenged in appellants' statement of their points and authorities, but the questions thus suggested are not urged in argument, and in nearly every instance the contention of counsel rests on an erroneous assumption as to the facts shown in evidence. There is no occasion to discuss these rulings in detail.

Judgment affirmed.



NOTE.—Reported in 120 N. E. 705. Wills: contest, burden of proof, Ann. Cas. 1914C 535; evidence admissible to establish undue influence, 31 Am. St. 686. See under (1) 40 Cyc 1211; (5) 40 Cyc 1314.

### HILL v. CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY.

[No. 23,300. Filed March 7, 1919.]

1. RAILROADS.—*Crossing Signals.—Negligence.*—The failure of a railroad company to give statutory signals as required by §5431 Burns 1914, §4020 R. S. 1881, is negligence *per se*. p. 133.
2. RAILROADS.—*Injuries to Persons on Tracks.—Trespasser or Licensee.*—The warning signals required of railroad companies at highway crossings, under §5431 Burns 1914, §4020 R. S. 1881, are for the benefit of travelers on the highways, and one injured in the railroad yards cannot base an action on the failure to give such signals. p. 133.
3. RAILROADS.—*Injuries to Persons on Track.—Trespasser or Licensee.*—A shipper who, in assisting in the loading of cars, in accordance with a custom under which shippers moved the cars from a switch track into position for loading, went upon the tracks to move a loaded car so that another could be moved into place, was engaged in work mutually beneficial to himself and the company and was neither a trespasser nor a mere licensee, but was rightfully there by implied invitation. p. 134.
4. RAILROADS.—*Injuries to Persons on Tracks.—Invitees.—Care.*—Where a shipper was upon the tracks of a railroad company by implied invitation to do work mutually beneficial to himself and the company, it was the company's duty not only to exercise ordinary care to keep the premises safe but to use reasonable precautions to avoid exposing him to unnecessary peril. pp. 135, 137.
5. NEGLIGENCE.—*Pleading.—Contributory Negligence.*—In personal injury cases, the complaint need not negative contributory negligence, since such negligence is a matter of defense; and the complaint is sufficient, unless the plaintiff's contributory negligence appears to reasonable minds as the only conclusion from the facts pleaded. p. 135.
6. RAILROADS.—*Persons Entitled to Protection.*—A railroad company owes to one in its yards who, at its implied invitation, is doing work beneficial to a shipper and the company, the duty of equipping its locomotives with the headlights as prescribed

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Hill v. Chicago, etc., R. Co.—188 Ind. 130.

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by an order of the Railroad Commission under §5533f Burns 1914, Acts 1909 p. 323. p. 136.

7. *APPEAL.—Review.—Sustaining Demurrer.—Harmless Error.*—Generally it is harmless error to sustain a demurrer to one paragraph of complaint where the facts pleaded therein are provable under another; but this rule does not obtain where the paragraph held had proceeds upon a different theory than such other paragraph. p. 138.

From Newton Circuit Court *Charles W. Hanley*, Judge.

Action by Frank Hill against the Chicago, Indianapolis and Louisville Railroad Company. From a judgment for the defendant, the plaintiff appeals. (Transferred from the Appellate Court under §1405 Burns 1914, Acts 1901 p. 590.) *Reversed.*

*C. C. Hine, H. R. Kurrie and William Darroch, Perry McCart, E. C. Field and Mose Leopold*, for appellant.

*William H. Parkinson and Abraham Halleck*, for appellee.

**MYERS, J.**—Appellant brought this action against appellee to recover damages for personal injuries received by him on November 26, 1912. The complaint was in three paragraphs. A demurrer for want of facts was sustained to the first and second, and overruled to the third. A general denial to the third paragraph formed the issue submitted to a jury resulting in a verdict, and judgment in favor of appellee. The sustaining of appellee's demurrer to the first and second paragraphs of complaint, and the overruling of his motion for a new trial are here separately assigned as error.

It appears from each of the first and second paragraphs that at the city of Rensselaer, Indiana, appellee maintained stock pens for the use of shippers of stock over its line of railroad. On the south side of these pens it maintained a switch track on which it placed cars, into which cattle, hogs, and other live stock were

loaded from these pens by means of a chute. South of this track, and at a distance only sufficient to permit cars to pass, appellee maintained what was known as its main track, and south of this track another switch track.

With reference to the handling of stock at this point, it was the custom of appellee to place its stock cars on the switch, or what may be called the loading track, and leave to the shippers the work of placing them in position for loading. If more than one car at a time was to be so used, the shipper would move by hand the loaded car away from the chute, and then move the empty car into place for loading.

On the occasion of the alleged injury four cars were to be loaded. One had been loaded and pushed east out of the way. Appellant and five other persons were engaged in this work. After moving the loaded car, and while returning to the west end of the empty car, appellant, while walking between the main track and the empty car, was struck by one of appellee's locomotives, which approached him from the east on the main track, and coasting at a speed of fifty miles per hour. For more than one mile east from the point where the accident happened, the track was clear and almost level. The accident occurred about six o'clock in the evening. It was dark, and the wind was blowing from the northwest.

It also appears that the space between the loading track and the pens was obstructed by various kinds of debris, thereby destroying its use as a passageway. The space between the loading track and the main track was obstructed by rails taken from the latter track. The recitals common to both paragraphs with reference to pens, tracks, and work in which appellant and his associates were engaged, and the allegations of negligent obstruction of the spaces between the main track and

the empty car, and the loading track and the pens, are all to be considered, not only for the purpose of showing that appellant was rightfully upon the premises of appellee but that he was thereby led into an unsafe place while at work loading the cars.

The acts of negligence charged in the first are: (1) In permitting the two spaces to be and remain obstructed, thereby causing appellant and his associates in the performance of their work to walk upon and dangerously close to the main track; (2) in failing to give crossing signals for highway and street crossings, one of which was within a short distance from their working place. The proximate cause relied on in this paragraph is the failure of appellee to give the statutory signals for highway and street crossings.

Section 5431 Burns 1914, §4020 R. S. 1881, makes it the duty of a railroad company to give signals when its engine approaches the crossing of any public

1. highway in this state. The object of this statute is to warn persons on the highway or crossing of the approach of trains. The failure to so warn such persons constitutes negligence *per se*. *Indianapolis, etc., R. Co. v. McLin* (1882), 82 Ind. 435; *Baltimore, etc., R. Co. v. Walborn* (1891), 127 Ind. 142, 26 N. E. 207.

Appellant was injured while in appellee's yards. He was not, as is a traveler upon a highway, within the protection of the statute requiring the company to

2. give him highway warning signals. *Reynolds v. Great Northern R. Co.* (1895), 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695; *Williams v. Chicago, etc., R. Co.* (1891), 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. 397; *Halbert v. Wabash R. Co.* (1909), 151 Ill. App. 352; *Norfolk, etc., R. Co. v. Gesswine* (1906), 144 Fed. 56, 75 C. C. A. 214; *Everett v. Great Northern R. Co.* (1907), 100 Minn. 309, 111 N.

W. 281, 9 L. R. A. (N. S.) 703, 10 Ann. Cas. 294; *Baltimore, etc., R. Co. v. Bradford* (1898), 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. 252. There was no error in sustaining the demurrer to the first paragraph.

The second paragraph proceeds on the theory: (1) Negligent obstruction of the two passageways, thereby forcing appellant and his associates into a dangerous place in the performance of their work. (2) Negligence in failing to equip the locomotive which collided with appellant with a headlight of not less than 1,500 candle power, in accordance with an order of the railroad commission, which order was at the time in full force and effect. (3) Negligence in equipping said locomotive with a headlight of less than 100 candle power so that no rays of light were reflected along the track in advance of the locomotive to warn appellant of its approach or to enable those in charge of the locomotive to observe and warn him of the danger in time to avoid the accident.

This paragraph presents three questions: (1) Was appellant under the facts disclosed by this paragraph a mere licensee or trespasser while on the premises of appellee to whom appellee owed no duty other than not to wantonly or wilfully injure him. (2) Did the facts alleged affirmatively show that he was guilty of contributory negligence? (3) Did appellee violate any duty owing to appellant in failing to equip its locomotive with a headlight in compliance with the order of the Railroad Commission alleged to be in full force and effect.

The allegations of this paragraph clearly show that the work in which appellant was engaged was not only beneficial to the person whose stock was being

3. loaded, but to appellee as well. The work was being done in the usual and customary manner. The manner of handling loaded and empty cars at this

point was known and understood by both parties to this case. The facts disclosed by this paragraph are sufficient to invoke the general rule as stated in 33 Cyc 764 as follows: "Where one is engaged on or about railroad tracks or cars in work which is mutually beneficial to himself and the railroad company, and his work requires him to go on such tracks or cars, his going thereon when required is generally held to be by the express or implied invitation of the railroad company, and he is neither a trespasser, nor a mere licensee."

Appellant's work, as appellee well knew, required him to be in close proximity to its main track. This fact, coupled with the facts showing negligent obstruc-

4. tion of passageways which otherwise might have been safely used by shippers and their assistants in loading cars, was sufficient to overcome the contention that appellant when injured was a trespasser or mere licensee. Our conclusion then is that appellant was on the premises of appellee rightfully, and it may be said that he was there on its implied invitation. Such an invitation carries with it not only the duty of exercising ordinary care to keep the premises safe (*Chicago, etc., R. Co. v. Pritchard* [1906], 168 Ind. 398, 411, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. [N. S.] 857), but the further duty of so conducting its activities about the premises, and by the use of such reasonable precautions, as may be reasonably prudent under all the circumstances to avoid exposing persons there employed to unnecessary peril.

On the question of contributory negligence, it must be kept in mind that this is an action where, by statute (§362 Burns 1914, Acts 1899 p. 58) contributory

5. negligence is a matter of defense. The complainant as a question of pleading is not bound to negative his own fault, and is entitled to have the inferences in the complaint upon that subject drawn in

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Hill v. Chicago, etc., R. Co.—188 Ind. 130.

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his favor. *Cleveland, etc., R. Co. v. Lynn* (1908), 171 Ind. 589, 593, 85 N. E. 999, 86 N. E. 1017.. Therefore, unless the facts stated are such that all reasonable minds would readily agree to his guilt in this respect, this paragraph would not be subject to a demurrer for want of facts. *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612. While plaintiff was not walking upon the track, he was not out of danger from a passing train. He did not see the on-coming train in time to avoid injury. But the question which naturally arises from this failure is answered only upon a consideration of all facts and circumstances measured by the action of an ordinarily prudent and careful person under like conditions. Applying these rules to the facts under consideration contributory negligence does not affirmatively appear.

It is next contended that appellee owed appellant no duty to maintain or equip its locomotive with a head-

light as required by an order of the Railroad Com-

6. mission. The statute on this subject (§5533f

Burns 1914, Acts 1909 p. 323) granted to the railroad commission authority to investigate the condition and efficiency of headlights in use on locomotive engines on the railroads in this state, "*and if found to be inadequate for the protection of persons and property* (our italics) or any other purpose, to investigate and determine what would be the most practicable and efficient headlight for all purposes."

The paragraph of complaint under consideration shows that the Railroad Commission, in compliance with this statute, issued an order to appellee requiring it to equip its locomotives in use, as was the one here in question, with a headlight of not less than 1,500 candle power. Appellee failed to comply with this order. The locomotive which struck appellant was equipped with an oil lamp as a headlight of less than 100 candle power.

This headlight reflected no light along the track in advance of the locomotive to warn persons of its approach, or to enable those in charge of it to observe persons on or near the track and give them protection by timely warnings. The authority of the commission to make this order is not questioned. The statute directs the commission to investigate, and then make an order for the installation of headlights on locomotives in use, which in its judgment will better protect persons and property. The statute is general in its terms, and, in the absence of any intention to limit its application, it must be construed as applying to all persons, and to all property which will be more adequately protected by the use of a more efficient headlight.

We have seen that appellant was on appellee's premises not as a trespasser or mere licensee but rightfully there in order to do the work required of him.

4. This being true, appellee was bound to use ordinary care for his protection. The method employed by shippers in placing cars in position for loading, and known to appellee, necessarily brought appellant while there at work dangerously close to its main track. The premises of appellee where the accident happened is shown to have been frequently used by shippers of stock, and under such circumstances it was the duty of appellee to exercise care in the running of its trains, to avoid injury to such persons. *Connell v. Southern R. Co.* (1899), 91 Fed. 466, 33 C. C. A. 633. The omission to comply with the order of the commission, under the facts here disclosed, was the neglect of a precaution reasonably proper for the protection of the persons there employed, and amounted to negligence. The facts under consideration justify the conclusion that the order of the commission charged appellee with the duty of installing on its locomotive a headlight of certain specified candle power, and the



violation of that duty resulted in the injury of appellant. Therefore it was error to sustain the demurrer to the second paragraph of complaint.

Appellee insists that if the trial court erred in sustaining the demurrer to either the first or second paragraph, such ruling was harmless, for the reason that all of the evidence which might have been introduced under either of these paragraphs was admissible under the third.

With reference to this contention the general rule is that: "Where a demurrer is sustained to one paragraph of complaint and the same evidence may be

7. introduced and the same relief granted under another paragraph, such ruling, though erroneous, is harmless error." *Heitz v. Knox County, etc., Tel. Co.* (1910), 46 Ind. App. 485, 487, 92 N. E. 1040, and cases there cited. But where, as here, the one held bad and the one held good proceed upon different theories, and are not substantially alike, this rule does not obtain.

It is true the third paragraph, by way of recitals and direct allegations of fact, contains all the facts found in the second paragraph, nevertheless appellant's right of recovery under this paragraph is based on the use on a dark night of an oil headlight which was so defective as not to give out rays of light sufficient for appellant or his associates to see the approaching train in time to avoid injury. Looking to the record, it will be seen that the jury returned with their general verdict answers to interrogatories. These answers, so far as material, go to the question of whether or not the headlight on the locomotive in question could have been seen by appellant had he looked. From our examination of the record we are clearly of the opinion that the case was tried solely upon the theory presented by the third

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Martin v. Lilly—188 Ind. 139.

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paragraph of the complaint. It does not appear affirmatively from the record that no harm resulted to appellant from the error in sustaining the demurrer to the second paragraph of his complaint.

Appellant in support of his motion for a new trial relies solely upon alleged errors of the court in giving to the jury certain instructions. Appellee insists that these instructions are not properly before us. However this may be, no good purpose can be subserved by a further consideration of any additional questions, for, from a casual observation of the record pertaining to these questions, they will not likely arise in the retrial of this cause, nor are they of general concern.

The judgment of the trial court is reversed, with instructions to overrule appellee's demurrer to the second paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 122 N. E. 321. Railroads: running train without headlight toward person on track at place other than crossing, Ann. Cas. 1912A 153. Negligence: where accident may have resulted from negligence of injured person, 113 Am. St. 999. Distinction between licensee and invitee, Ann. Cas. 1913C 570. See under (2) 33 Cyc 754; (3) 33 Cyc 756.

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### MARTIN ET AL. v. LILLY.

[No. 23,297. Filed January 7, 1919. Rehearing denied March 11, 1919.]

1. **MASTER AND SERVANT.**—*Liability for Agent's Acts.*—*Relation of Parties.*—Where an automobile was returned to the owner's residence after repairs had been made and the owner permitted the repairman to drive it back to the garage, accompanied by the owner's son, who was to return it, the car on such trip was not used in the defendant's business so as to make him liable for injuries to a passenger in another vehicle with which the automobile collided. p. 141.
2. **HIGHWAYS.**—*Use of Automobiles.*—*Care.*—*Dangerous Instrument.*—An automobile is not a "dangerous instrument," and the legal rules are applicable to it in the same manner as to other vehicles. p. 143.

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Martin v. Lilly—188 Ind. 139.

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3. **HIGHWAYS.—Use of Road.—Duty of Automobile Driver.—Jury Question.**—The driver of an automobile is required to use the care that an ordinarily prudent person would exercise under like circumstances, and whether he must keep a constant lookout for pedestrians and for other vehicles under given circumstances is for the jury to determine. p. 144.
4. **NEGLIGENCE.—Due Care.—Jury Question.**—Whether the conduct of an automobile driver under given circumstances constitutes the care that an ordinarily prudent person would exercise under like circumstances is a question for the jury. p. 144.
5. **TRIAL.—Instructions.—Cure of Error.**—An instruction that erroneously stated it to be the duty of an automobile driver to keep a "constant lookout" for pedestrians and for other vehicles could not be cured by other instructions stating the correct rule as to the care required. p. 144.
6. **JURY.—Examination.—Discretion.**—The examination of jurors on the *voir dire* to determine whether peremptory challenge shall be used is largely in the discretion of the trial court, and is limited by the good faith of the examining attorney. pp. 144, 145.
7. **TRIAL.—Conduct of Counsel.—Reference to Insurance.**—In an action for injuries sustained by the plaintiff in a collision with the defendant's automobile, it was error for the plaintiff's counsel to offer in the presence of the jury to prove that the defendant carried indemnity insurance and that his counsel were employed by the insurance company. p. 144.
8. **APPEAL.—Harmless Error.—Misconduct of Counsel.—Cure of Error.**—In an action for injuries sustained by the plaintiff in a collision with the defendant's automobile, the misconduct of the plaintiff's counsel in offering to prove in the presence of the jury that the defendant carried indemnity insurance and that his counsel were employed by the insurance company, was not cured by an instruction that the defendant was not liable unless the car was being used in his business at the time of the accident. p. 146.

From Warrick Circuit Court; *R. E. Roberts*, Judge.

Action by Martin W. Lilly against Richard E. Martin and others. From a judgment for the plaintiff, the defendant appeals. (Transferred from the Appellate Court under §1405 Burns 1914, Acts 1901 p. 590.) *Reversed.*

*Albert W. Funkhouser, Arthur Funkhouser, Robert*

*D. Markel, Albert C. Funkhouser, James T. Walker and Henry B. Walker, for appellants.*

*Robinson & Stilwell and Swan & Mason, for appellee.*

TOWNSEND, J.—Appellee, while riding on the rear seat of a motorcycle owned and operated by one Kale, collided with an automobile owned by appellant Richard W. Martin. The automobile at the time was being driven by appellant Joseph Schofield, who was accompanied by Richard Martin, infant son of appellant Richard W. Martin. Appellee obtained a verdict and judgment against the two Martins and Schofield for personal injuries caused by this accident.

The errors claimed are presented by motion for a new trial. They may be considered under three topics: (1) The verdict is not sustained by sufficient evidence, particularly as to appellant Richard W. Martin, the owner of the automobile. (2) Error in giving and refusing instructions. (3) Misconduct of appellee's counsel while examining jurors on the *voir dire*.

So far as the first question is concerned, the allegation in the complaint is that the automobile was being driven at the time of the accident by Martin, a son of the owner, and by appellant Schofield "for and on behalf of and in the business of the said defendant Richard W. Martin."

The evidence shows that appellant Richard W. Martin lives five or six miles from Evansville, Indiana, and about three and one-half miles from the scene of

1. the accident; that he is a farmer and road contractor; that he bought the automobile in question for the use of the family, which consisted of two sons and a wife, and also for use in his business as road contractor; that he himself did not drive the car; that when he used it his son (the Richard Martin in this suit) drove it for him; that the car for about three

weeks previous to the accident had been in a garage in Evansville for repairs; that the appellant Schofield, who had been or was a neighbor boy in the community where Martin lived, was a repair man working in this garage; that on the day of the accident appellant Schofield and the boy, Richard Martin, worked on the car in the garage in Evansville, putting on a starter and generator, which had during the previous three weeks been sent to the factory for repairs; that when they finished they drove the car out to appellant Richard W. Martin's home; that Schofield wanted Richard W. Martin to ride in the car to see that it was all right; that Richard W. Martin said he would take Schofield's word for it and did not want to see the car tried out; that Schofield and young Martin had agreed on the way out from Evansville that young Martin would bring young Schofield back in the car if his father would let him; that when young Martin asked, the father refused and said that Schofield should stay all night; that Schofield then said that he had to be back in the garage in Evansville that night; that then appellant Richard W. Martin said: "All right then, if you have to go you can take the car"; that Schofield, who was at the steering wheel at the time of this conversation, drove the car back towards Evansville and was driving the car at the time of the accident; that young Martin accompanied him in the car and was in the car at the time of the accident; that when they reached a point three and one-half miles from Richard W. Martin's home, going west on Lincoln avenue, they attempted to turn south on Weinbach avenue, and at this corner collided with the motorcycle in question, which was coming east on Lincoln avenue; that as a result of the collision appellee, who was riding on the rear seat of the motorcycle, suffered the injuries complained of.

This evidence not only does not sustain, but flatly con-

tradicts, the allegation in the pleading. The car was being driven by, "for, and on behalf of" Joseph Schofield in his business and for his accommodation.

At first the courts, like the horses, seemed to be afraid of automobiles and were inclined to stretch the rule of *respondeat superior* and to hold the owner liable on one pretext or another whether the driver was acting for the owner or not. This departure from the reasonable and practicable rule, that the principal shall respond in damages for the torts of his agent only when the agent is acting for the principal, soon led to absurdities and injustice. And courts have been sitting up nights writing volumes to get back to the correct rule. Witness: *Hays v. Hogan* (1917), 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C 715, and cases there cited, discussed, distinguished, analyzed and overruled. If the reader is not surfeited when he has examined this authority, then see *Reilly v. Connable* (1915), 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A 954, Ann. Cas. 1916A 659; *Luckett v. Reighard* (1915), 248 Pa. St. 24, 93 Atl. 773, Ann. Cas. 1916A 662; *Smith v. Burns* (1914), 71 Ore. 133, 135 Pac. 200, 142 Pac. 352, L. R. A. 1915A 1130, Ann. Cas. 1916A 666; *Janik v. Ford Motor Co.* (1914), 180 Mich. 557, 147 N. W. 510, 52 L. R. A. (N. S.) 294, Ann. Cas. 1916A 669, and notes appended to these cases in Annotated Cases 1916A.

An automobile is not a dangerous instrument.

2. The rules of law are applied to it in the same manner as to other vehicles. (Authorities above.)

The verdict in this case was not sustained by sufficient evidence, so far as the appellant Richard W. Martin is concerned.

We now come to the instructions. Among other instructions given at the request of appellee, we find this: "No. 8. It is the duty of the driver of an automobile while driving the same upon a public highway to be

*constantly on the lookout for pedestrians and other persons or vehicles that may at the time be making use of the highway. And if you believe from the evidence that the driver of the automobile did not keep a constant lookout while so driving said automobile and that because of such failure on his part the accident here in question occurred, then the court instructs you that you would be authorized to find such driver negligent."*

This instruction is erroneous. The driver of this automobile was required to use the care which an ordinarily prudent person would exercise in like cir-

3. cumstances. This is the care required by law. Whether conduct in a given set of circumstances measures up to this, is for the jury. The jury
4. must be permitted to determine whether this care requires "constant lookout" or something else, in circumstances shown by the evidence.

When such an instruction as No. 8 is given, it cannot be cured by others which state the rule correctly; because, every time the court tells the jury in other

5. instructions that the driver is required to use the care that an ordinarily prudent person would exercise in like circumstances, the jurors, if obedient to the oath, are bound to observe that this means "constant lookout."

In this case the regular panel of twelve jurors appeared and were examined. One was excused peremptorily by the appellee. Of the thirteen jurors

6. examined, none owned an automobile and none a motorcycle. Each was asked whether he had any interest in the American Automobile Insurance
7. Company of St. Louis, Missouri. An objection was made by appellants' counsel to this question upon the ground that it was intended and tended to prejudice the jurors. Appellee's counsel, in the presence of the jury, offered to prove that appellant Richard

W. Martin had indemnity insurance on his automobile. Appellants' counsel objected to this offer and asked that it be not made in the presence of the jury. Later on in the examination of jurors, when questions were asked and objected to, counsel for the appellee offered to put the appellant Richard W. Martin on the stand and show that he had indemnity insurance on his automobile in the sum of \$5,000. They also offered to prove that defendants' counsel were not employed by appellants, but were employed by the insurance company, and offered to have one of appellants' counsel sworn and put upon the witness stand to prove this. All of this was over the objection of appellants' counsel and in spite of their request to the court that such offers be not made in the presence of the jury. Their objections were overruled and their requests denied, as was also their motion to withdraw the submission of the case and discharge the jury, all of which were made in proper and timely manner.

The examination of jurors on the *voir dire* to determine whether peremptory challenge shall be used is largely in the discretion of the trial court, and is

6. limited by the good faith of the lawyer propounding the question. We all know as men what this means, but we seem to have some difficulty with it as judges and as lawyers. The purpose of the examination is not to disclose to the juror what the lawyer has in his mind so much as it is to enable the lawyer to find out what is in the juror's mind. Many questions may be asked and considerable latitude may be and should be allowed to enable a party to a law suit to find out whether a juror has any interests, business associations, social opinions, preconceived notions, experiences or prejudices that will affect him as a juror in the particular case. Usually in these inquiries counsel are



careful not to disclose their purpose. If they were as careful in cases where there is an indemnity insurance contract, they could find out whether any juror was interested either directly or indirectly in any indemnity company without disclosing to the jurors that such company has an interest in the litigation. Good faith marks the boundary line. It cannot be made more definite by written words. It must be very definite, however, in the mind of every thinking man. Defendants are not to be punished for having insurance. Under our law the insurance company is not a party. The line has been drawn in this state in *Inland Steel Co. v. Gillespie* (1913), 181 Ind. 633, 104 N. E. 76, and *M. O'Conner Co. v. Gillaspay* (1907), 170 Ind. 428, 83 N. E. 738. Counsel for appellee seem to think that these cases authorize an offer in the presence of the jury. They are mistaken. The offer, if required, is for the court. One of the grounds for reversal in *Inland Steel Co. v. Gillespie* was that the question propounded disclosed that the defendant was insured by an indemnity company.

It is insisted in the instant case that this error of misconduct was cured by an instruction. It is true that erroneous and extraneous matters sometimes get

8. into a law suit through the zeal of counsel, and, if checked at once by the trial court and the jury is instructed, this may be cured; but one party may not be permitted to get the other into a dying condition and then expect the court to revive him by instructions.

The evidence in this case showed that Richard W. Martin had no business or purpose to serve in allowing his automobile on the night of the accident in question to be driven back to Evansville. The evidence showed that he did not want it to go, but that, when he found that Mr. Schofield had to go back to his business, he permitted Schofield and the boy to take the car. The jury were instructed with these facts before them, that,

unless they found that the automobile at the time of the accident was being driven for appellant Richard W. Martin in his business, there could be no recovery. One would think that a question like this, submitted to a jury on this evidence without the influence of any outside matter, would lead twelve ordinary minds to find in favor of Richard W. Martin; but the jury returned a verdict against him for \$4,000. No doubt a native shrewdness on the part of the jurors kept them from making it \$5,000, the exact amount of the indemnity contract, concerning which they had been informed in the examination on the *voir dire*.

The misconduct of counsel was not cured by instructions in this case.

The judgment is reversed, with instructions to the trial court to sustain appellants' motion for a new trial.

NOTE.—Reported in 121 N. E. 443. Rights and duties of persons driving automobiles on highway, 13 Ann. Cas. 463, 21 Ann. Cas. 648, Ann. Cas. 1916E 661, 108 Am. St. 215. Automobile as inherently dangerous machine, 19 Ann. Cas. 1229. Liability of owner for act of driver other than his servant or child, Ann. Cas. 1916A 668. Trial: propriety of comment by counsel on the fact that defendant, other than master, in an action for negligence is insured against liability, Ann. Cas. 1914A 948.

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### HINSHAW v. STATE OF INDIANA.

[No. 23,127. Filed March 13, 1919.]

1. CRIMINAL LAW.—*Definition*.—Under §237 Burns 1914, §237 R. S. 1881, all crimes in this state are statutory. p. 150.
2. CONSPIRACY.—*To Commit Felony*.—*Indictment*.—Under §2647 Burns 1914, Acts 1905 p. 584, §641, an indictment for conspiracy to commit a felony must charge the purposed felony as specifically as though the defendant were on trial for that felony. p. 150.
3. CONSPIRACY.—*To Defraud*.—*Indictment*.—*False Pretenses*.—In a prosecution for conspiracy, the allegation that the defendants "did \* \* \* conspire \* \* \* designedly with the intent to cheat and defraud \* \* \* by inducing and

procuring \* \* \* by then and there feloniously, knowingly, designedly and falsely pretending, representing and giving out" was insufficient to charge a conspiracy to commit the crime of false pretense, under §2647 Burns 1914, Acts 1905 p. 584, §641, since "cheating" and "defrauding" are broader terms than "false pretense," and include not only the crimes of false pretense but also all civil frauds. p. 151.

4. CONSPIRACY.—*Indictment.—Sufficiency.—Charging Civilly Unlawful Act.*—In a prosecution for conspiracy, an indictment charging, as the object of the conspiracy, the commission of a civilly unlawful act, though such act is closely and logically related to another that is criminal, is insufficient under §2647 Burns 1914, Acts 1905 p. 584, §641, defining conspiracy as the uniting or the combining of persons, etc., to commit a felony. p. 151.
5. CONSPIRACY.—*Indictment.—Sufficiency.—Inference.*—The gist of a criminal offense must be stated in direct and positive terms; hence, in a prosecution for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, an indictment containing words that show the object of the conspiracy to be nothing more than the civilly unlawful act of fraud, though such words could be used to state the gist of the purposed offense as that of false pretense, cannot be held sufficient as charging the purposed offense substantially in the language of the statute. p. 152.
6. CONSPIRACY.—*Indictment at Common Law.*—At common law, a conspiracy to do an unlawful act, or to do a lawful act by criminal means, was indictable. p. 152.
7. INDICTMENT AND INFORMATION.—*Constitutional Law.—Pleading.*—Chapter 62, Acts 1915 p. 123, requiring that recitals, etc., in all criminal and civil pleadings shall be considered as allegations of fact, etc., is void so far as it applies to indictments, in view of Art. 1, §13, of the Constitution. p. 153.
8. CONSTITUTIONAL LAW.—*Indictments.—Sufficiency.—Rights of Accused.*—The words "nature and cause of the accusation" as used in Art. 1, §13, of the Constitution, relative to the rights of one accused of crime, mean that the gist of the offense shall be charged in direct and unmistakable terms. p. 154.
9. CONSPIRACY.—*To Embezzle.—Indictment.*—An indictment of defendants, who were officers of a bank, for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, to commit the crime known as bankers' embezzlement as defined by §2294 Burns 1914, Acts 1907 p. 14, was insufficient, where it failed to state that deposits, alleged to have been feloniously and fraudulently taken and received by the defendants, were so taken and received in their capacity as officers of the insolvent bank. p. 156.

10. **EMBEZZLEMENT.**—*Bankers' Embezzlement.*—*Indictment.*—The legislature intended that the requisites of pleading with reference to embezzlement were to apply to indictments for bankers' embezzlement as defined by §2294 Burns 1914, Acts 1907 p. 14, this construction requiring that the charge of *taking* and *receiving* be connected with the statement that such *taking* and *receiving* was by virtue of office, agency or employment. p. 156.

From Hamilton Circuit Court; *Will M. Sparks*, Special Judge.

Prosecution by the State of Indiana against Edwin M. Hinshaw. From a judgment of conviction, the defendant appeals. *Reversed.*

*Christian & Christian, Fitzpatrick & Fitzpatrick, Ralph H. Waltz, and Holmes & McCallister*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings, Edward M. White, N. C. Neal and J. F. Neal, and George W. Osborn*, for the state.

TOWNSEND, J.—Appellant was convicted of conspiracy to commit a felony. The indictment, in two counts, was against him and three other persons. He was tried separately.

The questions are raised by motion to quash each count of the indictment. In the first count, omitting the formal matters, the grand jury presents: "That Edwin M. Hinshaw (with three others, at a time named) \* \* \* did then and there unlawfully, knowingly and feloniously unite, combine, conspire, confederate and agree to and with each other, for the object and purpose, *designedly and with the intent to cheat and defraud* divers citizens of said county of Hamilton, and the public generally, by inducing and procuring said citizens and the public generally to pay and deposit money, and to deposit checks and drafts to the credit of such depositors in and into the Farmers and Merchants Bank of Cicero, Indiana, the said bank being then and

there an incorporated bank, by then and there feloniously, knowingly, designedly and falsely pretending, representing and giving out in words and speeches, that said bank was then and there solvent, and by then and there using words and speeches that meant and imparted that said bank was then and there solvent and by then and there publishing in a newspaper of said county, verified statements of and concerning the liabilities, and resources of said bank, which showed and tended to show that said bank was solvent, whereas, in truth and in fact, said bank was then and there insolvent," etc.

Then this count alleges in substance that appellant and other persons named knew that the bank was insolvent; that divers citizens of the county and the public generally relied on the pretenses and representations and deposited their money in this bank; that the money was lost; that appellant and the three others were officers of the bank.

In this state all crimes are statutory. §237 Burns 1914, §237 R. S. 1881. The conspiracy statute on which this count of the indictment is based is in part

1. as follows: "Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a *felony*"
2. etc. §2647 Burns 1914, Acts 1905 p. 584, §641.

The crime being a conspiracy to commit a *felony*, the purposed felony must be charged as specifically as though the defendant were on trial for that felony. *Landringham v. State* (1874), 49 Ind. 186; *Scudder v. State* (1878), 62 Ind. 13; *Smith v. State* (1884), 93 Ind. 67; *Green v. State* (1901), 157 Ind. 101, 60 N. E. 941; *Eacock v. State* (1907), 169 Ind. 488, 82 N. E. 1039; *Woodsmall v. State* (1913), 179 Ind. 697, 102 N. E. 130; *Allen v. State* (1914), 183 Ind. 37, 107 N. E. 471.

The above cases mean that all the elements of the felony, which is the purpose and object of the conspir-

acy, must be alleged so directly and positively that the defendant may know what he has to meet, and that the court may readily see what felony is purposed, and know how to limit the evidence. Indictments must be particular and specific enough in their charges that the grand jury may not base an indictment on evidence of one crime and the petit jury base a verdict on evidence of another crime. An indictment must be so plain that an acquittal or conviction can be pleaded in bar of a subsequent prosecution for the same offense.

It is earnestly insisted by learned counsel for the appellant that this count of the indictment does nothing but charge appellant with conspiring "to cheat and defraud," and that the further allegation in the indictment that the purpose of the alleged conspiracy was accomplished is but an aggravation of the charge of conspiracy, and does not aid this count of the indictment, because there is nowhere aptly charged, as the purpose and object of the conspiracy, anything which is denominated a felony by the statutes of this state.

Because, in the part of the indictment which is designated the object and the purpose of the conspiracy, there are apt words, under the statute and under ju-

3. dicial interpretations of the statute, which could be used to charge the crime of false pretense, it is contended by the state that therefore this count of the indictment is sufficient. The allegation in this count is "designedly with the intent to cheat and defraud, etc., \* \* \* by inducing and procuring, etc., \* \* \* by then and there feloniously, knowingly, designedly and falsely pretending, representing and giving out" etc.

It is not a felony in this state to cheat and defraud. Cheating and defrauding are broader terms than the crime of false pretense. Within these two terms

4. are included not only the crimes of false pretense,

but also all civil frauds. Nor does it help this count of the indictment because fraud and false pretense are logically related. Perjury is logically and closely related to "thwarting the purposes of justice," yet the latter, not being a crime defined by statute, could not be the object of a criminal conspiracy under our law, even though it was alleged that thwarting the purposes of justice was accomplished by perjury aptly charged as the means. *State v. McKinstry* (1875), 50 Ind. 465. The most that this count charges as the object of the conspiracy is to do a civilly unlawful act by a criminal means.

The gist of a criminal offense must be stated in direct and positive terms. This count of the indictment would be good at common law, for at common law a con-

5. spiracy to do an unlawful act is indictable, and a conspiracy to do a lawful act by a criminal means is indictable. A conspiracy to do an act which
6. is a civil wrong is indictable at common law.

That is to say, each one of the conspirators doing the act by himself would be liable to respond in damages only; but when two or more conspire to do the act, the conspiracy becomes criminal. Therefore the authorities from other states where the common-law crime of conspiracy exists are wholly aside from the point here in question. The state cites in support of this count of the indictment the case of *Cole v. People* (1876), 84 Ill. 216, and *Smith v. People* (1860), 25 Ill. 9, 76 Am. Dec. 780. An examination of these cases discloses that they are decided upon the common-law crime of conspiracy. For discussion, see note to *Smith v. People*, *supra*.

We can infer from this count of the indictment that the state intended to charge that the defendants conspired for the object and purpose feloniously,

6. knowingly, designedly and falsely to pretend, etc.

Because the words are in the indictment which could be used to positively state the gist of the offense as the object of the conspiracy, it will not do to say that therefore the state has charged the purposed offense substantially in the language of the statute. This count of the indictment is bad, and the motion to quash should have been sustained.

Undoubtedly the state was misled in drawing this indictment by examining generally the law on the subject of conspiracy, rather than confining its investigation to the adjudicated cases in this state. It may be that the state was relying on chapter 62, Acts 1915 p. 123, which is designated "An act concerning proceedings in civil and criminal cases." This act provides that "all pleadings \* \* \* in any \* \* \* criminal case, \* \* \* that all recitals therein and all statements contained in any participial expression, etc., \* \* \* shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof" etc., unless and until the opposing party moves to make such pleading more specific. We infer from the record in this case that this count in the indictment was sustained in the lower court by virtue of this statute and because of arguments made thereon, because after the motion to quash we find a motion to make this count of the indictment more specific. The defendant had evidently been met by the state with arguments that the recitals in the pleading were deemed to be positive allegations of the gist of the purposed crime, and that the defendant was bound thereby, unless and until he made a motion to make the same more specific.

This act, chapter 62, Acts 1915 p. 123, is void so far as it applies to indictments, because §13 of article 1 of the Bill of Rights of the state Constitution provides that "the accused shall have the right \* \* \* to demand the nature and cause of the



accusation against him, and to have a copy 8. thereof." The words "*nature and cause of the accusation*" have a well-defined meaning, and had such meaning at the time of the adoption of the Constitution. That meaning is that the gist of an offense shall be charged in direct and unmistakable terms. In passing upon the same provision of the federal Constitution in *United States v. Cruikshank* (1875), 92 U. S. 542, 557, 23 L. Ed. 588, the court said: "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' And in *United States v. Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, —it must descend to particulars."

The legislature will not be permitted by indirection to do what it could not do directly. It has no power under the fundamental law to compel one who is charged with crime to meet the conclusions and recitals of the pleader, and it has no power to do away with the clear and positive averments with reference to the *gist* of the offense. It once tried to do this directly by saying that, in conspiracy for the purpose and object of committing a felony, it should not be necessary for the state to

charge the purposed felony. This court held that act void. *Landringham v. State, supra.*

The next count of the indictment charges that appellant and three others, as officers of the Farmers' and Merchants' Bank of Cicero, it being an incorporated bank, "did then and there unlawfully, knowingly and feloniously unite, combine, confederate and agree to and with each other to feloniously and fraudulently *receive* and *take* from divers citizens of said county and the public generally, who and each of whom, were not then and there indebted to said bank and *to have* then and there *deposited* in said bank money, checks and drafts belonging to and then and there the property of said depositors, that is to say, the property of the depositor or depositors who deposited the same; that said bank was then and there wholly insolvent, which fact was then and there well known to the said \* \* \* Edwin M. Hinshaw, \* \* \* (and three other persons), and each of them, whereby said money, checks and drafts and each of the same, would be and were, lost to said depositors and each of them."

This count of the indictment is intended to charge as the purpose and object of the conspiracy what is commonly known as bankers' embezzlement under §2294 Burns 1914, Acts 1907 p. 14, which provides: "If \* \* \* any officer, \* \* \* of any \* \* \* incorporated bank \* \* \* shall fraudulently receive from any person, \* \* \* not indebted to such \* \* \* incorporated bank any money, \* \* \* when, at the time of receiving such deposit, such \* \* \* incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, such \* \* \* officer, \* \* \* so receiving such deposit shall be deemed guilty of *embezzlement.*"

In this count of the indictment the gist of the purposed crime is stated as follows: "To feloniously and

fraudulently *receive* and *take* from divers citizens of said county and the public generally, etc., \* \* \* and *to have deposited*, etc." It is nowhere charged that the defendants *received* and *took* in their capacity as officers of the bank. The recital in the first part of the indictment of their being then and there the officers of the bank does not help out the allegations in the purposed crime; nor would it be good, if instead of being a recital, it alleged directly and positively that they were the officers of the bank.

It will be noted that the legislature in defining the crime says that whoever takes a deposit under the conditions designated in the statute shall be deemed

10. guilty of "*embezzlement*." The judicial interpretation of this statute has been that the legislature intended that the requisites of pleading with reference to embezzlement were to be applied in determining the validity of indictments under this statute. It is fundamental that, in embezzlements, the *taking* and *receiving* part of the charge must be connected and coupled with the statement that such *taking* and *receiving* was by virtue of the office, or the agency, or the employment. These principles of pleading were well established before the act in question was passed by the legislature; and this particular act has been interpreted by this court. *State v. Winstandley* (1899), 154 Ind. 443, 57 N. E. 109; *State v. Winstandley* (1900), 155 Ind. 290, 58 N. E. 71; *Vinnedge v. State* (1906), 167 Ind. 415, 79 N. E. 353; *Wright v. State* (1907), 168 Ind. 643, 81 N. E. 660.

Both counts of the indictment are bad, and the court erred in overruling appellant's motion to quash.

The judgment is reversed, with instructions to the trial court to sustain appellant's motion to quash each count of the indictment.

Willoughby, J., not present.

NOTE.—Reported in 122 N. E. 418. Conspiracy: sufficiency of allegations in indictment for conspiracy as to object of and means of accomplishing conspiracy, 21 Ann. Cas. 39; 8 Cyc 661, 662. Indictment for false pretenses, 25 Am. St. 384.

PRUDENTIAL INSURANCE COMPANY OF AMERICA  
v. RITCHEY.

[No. 23,263. Filed April 25, 1918. Rehearing denied  
March 13, 1919.]

1. INSURANCE.—*Life Insurance.*—*Beneficiaries.*—*Rights under "Facility Payment" Clause.*—*Action.*—Where death benefits of a life insurance policy were payable to the personal representative of the insured, unless settlement should be made under a "facility payment" clause empowering the company to pay such benefits to any relative by blood or marriage, or to any person appearing to the company to be equitably entitled thereto by reason of having incurred expense, etc., an action cannot be maintained to enforce payment by one with whom the company might have settled, at its option, under such facility clause, where such person is neither named as a beneficiary nor otherwise designated as the person entitled to recover. p. 159.
2. INSURANCE.—*Life Insurance.*—"Facility Payment Clause."—*Rights of One Paying Premiums.*—Payment of premiums on the life insurance policy of another gives the person so paying them no rights to enforce, under a "facility payment" clause in the policy, the payment of death benefits, since the payment of the premiums, in legal contemplation, was made by the insured. p. 160.
3. INSURANCE.—*Parol Assignment of Policy.*—*Validity.*—The parol assignment of an insurance policy is valid, unless forbidden by provision in the policy. p. 160.
4. PLEADING.—*Complaint.*—*Sufficiency.*—*Overcoming Defects.*—Where a complaint states a cause of action and also facts disclosing a defense thereto, the pleading is fatally defective unless it states facts sufficient to overcome the defenses disclosed. p. 161.
5. INSURANCE.—*Action on Policy by Assignee.*—*Complaint.*—*Sufficiency.*—In an action on a life insurance policy by an assignee, who has paid premiums, which policy gave the insurer the right to treat it as void on its assignment, a complaint alleging the assignment and making the policy an exhibit does not state a cause of action in the absence of allegations

showing that the insurer has waived, or is estopped from asserting, such right. p. 161.

6. **APPEAL**.—*Instruction*.—*Defective Complaint*.—*Failure to Demur*.—*Effect*.—*Verdict*.—*Statute*.—Since a verdict must be supported by all the facts essential under the law to sustain it, it is reversible error to instruct the jury that proof of the allegations of a complaint entitles the plaintiff to a verdict, where there is an omission to allege, directly or indirectly, a fact essential to the plaintiff's cause of action; and §344, cl. 6, Burns 1914, Acts 1911 p. 415, requiring memoranda to be filed with demurrers and providing that defects not specified therein shall be deemed as waived, etc., was not intended to change this rule so as to permit a recovery without proof of facts essential to the cause of action, though such facts are not pleaded. (*Dunham v. Jones* [1915], 184 Ind. 46; *Cincinnati, etc., R. Co. v. Gross* [1917], 186 Ind. 471, overruled.) pp. 162, 164.

From Clarke Circuit Court; *James W. Fortune*, Judge.

Action by Mary Ritchey against the Prudential Insurance Company of America. From a judgment for the plaintiff, the defendant appeals. (Transferred from the Appellate Court under §1405 Burns 1914, Acts 1901 p. 590.) *Reversed*.

*Whitcomb, Dowden & Stout, H. W. Phipps and E. C. Hughes*, for appellant.

*L. A. Douglass and Elmer Wetzel*, for appellee.

**LAIRY, J.**—Appellee recovered a judgment on a policy of insurance issued by appellant on the life of Robert B. Strepey. Under the conditions of the policy the benefits provided by the schedule were payable to the executors or administrators of the insured unless settlement should be made under article 2 of the conditions, which provides for facility payment. This article reads as follows:

“The company may make any payment provided for in this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably

entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial, or, if the insured be more than fifteen years of age at the date of this policy, for any other purpose, and the production by the company of a receipt signed by any or either of said persons or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

Appellee did not bring the action as executor or administrator, but sues in her own right. The complaint

alleges that appellee was related to the insured

1. by blood, being a cousin, and that he was at the time of his death a member of her family, and that for sometime before the death of assured she by his direction paid the premiums on the policy. The complaint also alleges that, on January 13, 1913, the insured sold, transferred and assigned said policy and the claim arising thereunder to appellee for value received, and to be received, and that both she and the assured notified the insurance company that the policy had been assigned to her. It is difficult from the complaint to discover whether she bases her right to recover on the assignment of the policy and the benefits provided for therein, or whether she claims a right to recover under section 2 of the conditions providing for facility payment hereinbefore set out. The "facility payment" clause gives to the company an option to make payment to any one having the qualifications named in the clause for the purpose of facilitating payment, but it does not entitle one to whom such payment might have been made at the option of the company to enforce payment of the sum due under the policy, where such person is not named as a beneficiary or otherwise designated as the person entitled to recover payment. *Lewis v. Metro-*

*politan Life Ins. Co.* (1901), 178 Mass. 52, 59 N. E. 439, 86 Am. St. 463; *Prudential Ins. Co. v. Young* (1895), 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. 319; *Prudential Ins. Co. v. Godfrey* (1909), 75 N. J. Eq. 484, 72 Atl. 456.

The fact, as alleged in the complaint, that appellee paid the premiums due on the policy for sometime before the death of the insured confers on her no

2. right to enforce payment under the clause in question. The authorities cited sustain this proposition, holding that the payments of premiums on the policy are, in legal contemplation, made by the insured.

It is apparent from what has been said that appellee had no right as a blood relative of the insured to enforce payment to her, although the company

3. might have exercised its option by paying her under the facility payment clause. If appellee possessed any right to enforce payment under the policy, it was because of the assignment to her as shown by the allegations of the complaint. The complaint alleges facts sufficient to show a parol assignment to her, accompanied by a delivery of the policy. Such assignments have been held valid unless forbidden by some provisions of the policy. *State, ex rel. v. Tomlinson* (1896), 16 Ind. App. 662, 675, 45 N. E. 1116, 59 Am. St. 335; *Stewart v. Gwynn* (1907), 41 Ind. App. 320, 324, 82 N. E. 1000, 83 N. E. 753. The complaint in this case sets out the policy as an exhibit wherein it is stipulated that the policy shall be void if it be assigned or otherwise parted with. It thus appears affirmatively from the allegations of the complaint that the assignment alleged and relied on was in direct violation of a condition of the policy providing that any assignment of the policy should render it void.

When a complaint states a cause of action, and also

states facts which show a defense to the cause of action so stated, the complaint is fatally defective unless

4. it states facts sufficient to meet and to overcome the defenses so disclosed. Under the provisions of the policy referred to, the company had a right

5. to treat the policy as void, and to refuse payment on that ground unless facts existed which estop it

from asserting that right or which amounted to a waiver of such right by the company. The complaint does not state facts sufficient to show that appellant waived such right, or that it was estopped by its conduct from asserting it. If such facts existed, it was necessary for appellee to plead them, for, in the absence of such facts, the complaint shows no right in appellee to recover under the alleged assignment. This being true, the complaint does not state facts sufficient to constitute a cause of action; and, if the defects had been properly pointed out by the memorandum filed with the demurrer, it would have been error to overrule the demurrer. The memorandum filed in support of the demurrer was based upon the single ground that the complaint failed to show any assignment or transfer of the policy to Mary Ritchey. As before stated, the complaint does allege facts sufficient to show a transfer or assignment of the policy; therefore, the court did not err in overruling the demurrer filed, as the complaint was not open to the objection pointed out. §344, cl. 6, Burns 1914, Acts 1911 p. 415. Under the provisions of the section cited, the party demurring shall be deemed to have waived his right thereafter to question the pleading for any defect not specified in such memorandum. Under this statute, it has been held that the sufficiency of the complaint cannot be questioned by an original assignment of error. *Hedekin Land, etc., Co. v. Campbell* (1915), 184 Ind. 643, 112 N. E. 97; *Pittsburgh, etc., R. Co. v. Farmers'*



*Trust, etc., Co.* (1915), 183 Ind. 287, 108 N. E. 108. Notwithstanding the statute precludes the appellant from questioning the sufficiency of the complaint at any later stage of the proceeding, it is still true that the complaint does not state facts sufficient to entitle plaintiff to recover under the law. If, on the trial, she had proved every fact alleged in her complaint and nothing more, she would not have been entitled to recover under the law, even though nothing had been shown as a defense.

The second instruction given by the court is as follows: "If you believe that the material allegations and statements of the complaint have been proved by a fair preponderance of the evidence, then you should find a verdict for the plaintiff for the full amount of said policy." As before stated, the complaint sets out the policy as an exhibit which contains a provision to the effect that the policy shall be void if it is assigned or parted with in any manner, and also alleges that appellee acquired the rights which she is seeking to enforce under an assignment of the policy. By the instruction given the jury was directed to return a verdict for plaintiff if it found these facts to be established by a preponderance of the evidence, without finding any fact showing that the right of the company to treat the policy as void by reason of such assignment had been waived, or that it was by its conduct estopped from asserting such right. The company was not liable to appellee on the policy, unless it had waived the right to treat it as void, or had estopped itself by its conduct from asserting such right.

By failing to point out this defect in the complaint by its demurrer, appellant waived the right to question

the sufficiency of the pleading at any later stage

6. of the proceeding by a motion in arrest of judgment or by an independent assignment of error, but it still had the right to insist that every material

fact legally essential to a recovery against it should be established by a preponderance of the evidence. The purpose of the statute cited was to prevent the reversal of cases on account of defects in pleadings not pointed out by memoranda filed with demurrers. It was intended to reinforce other statutes providing that, after verdict, pleadings should be deemed amended as to such defects so as to conform to the evidence; but it was not the purpose to dispense with the proof of facts essential under the law to constitute a cause of action or a cause of defense. The failure of defendant to point out a defect in a complaint does not preclude him from raising objections in any proper way as to the sufficiency of the evidence to sustain every material fact essential to a recovery whether such fact is pleaded or not. If there is a total want of evidence as to an essential fact, he may successfully raise the question by a motion for a new trial on that ground. Where there is a conflict in the evidence as to an essential fact, he has a right to have the question submitted to the jury for determination according to the preponderance of the evidence, whether such essential fact is pleaded or not. It is error to instruct a jury that proof of the allegations of a complaint entitles the plaintiff to a verdict where the complaint omits to allege either directly or inferentially a material fact which under the law is essential to entitle the plaintiff to a verdict. A verdict must be supported by all of the facts essential under the law to sustain it, and the statute requiring memoranda to be filed with demurrers was not intended to change this rule so as to permit a recovery without proof of essential facts, where such facts are not alleged in a complaint. Under the old rule a plaintiff must recover *secundum allegata et probata*, he could not recover according to facts alleged and not proved, nor according to the facts which he proved and did not allege, but according to the facts

alleged and proved. Under the former holdings of this court a complaint which was defective, because of the omission to allege a material fact essential under the law to a recovery, could not be cured by the evidence or by a special finding of the court or by a special verdict of a jury. *Western Assurance Co. v. Koontz* (1896), 17 Ind. App. 54, 46 N. E. 95; *Pittsburgh, etc., R. Co. v. Moore* (1898), 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Cleveland, etc., R. Co. v. Parker* (1899), 154 Ind. 153, 56 N. E. 86; *Lake Erie, etc., R. Co. v. Hoff* (1900), 25 Ind. App. 239, 56 N. E. 925. The more recent decisions hold that where the record shows that evidence has been introduced as to an essential fact not pleaded, and such fact has been determined under the evidence, the judgment rendered will not be reversed on account of such defect in the pleading. In conformity to our statutes on the subject the pleading is deemed to be amended in such a case so as to conform to the proof. §700 Burns 1914, §658 R. S. 1881; *Noble v. Davison* (1912), 177 Ind. 19, 96 N. E. 325; *Union Frat. League v. Sweeney* (1915), 184 Ind. 378, 382, 111 N. E. 305. These statutes and decisions modify the old rule so as to permit a judgment to be upheld on appeal on the strength of facts proved which were not alleged. A recovery cannot be had when the evidence does not sustain an essential fact alleged, and it would be preposterous to hold that a verdict in favor of plaintiff could be authorized where a fact necessary under the law to sustain it was neither alleged in the complaint nor proved by the evidence.

In the case of *Dunham v. Jones* (1915), 184 Ind. 46, 110 N. E. 203, this court said: "It is contended that the court erred in the second instruction given

6. because it authorized a verdict on the second paragraph of complaint, which, it is claimed, does not state a cause of action. Appellants waived a

consideration of the sufficiency of the paragraph by failing to demur." This case was reversed on other grounds and it is apparent that the question now before the court was not fully presented in that case, or that it was not given the careful consideration that its importance merited. The instruction passed on in that case is not set out in the opinion, and it is possible that it did not present the same question considered in this case. The later case of *Cincinnati, etc., R. Co. v. Gross* (1917), 186 Ind. 471, 114 N. E. 962, was decided on the authority of *Dunham v. Jones, supra*. After a more mature consideration, the court is of the opinion that the rule announced in those decisions is unsound, and the same is overruled as to the point here involved.

In view of the conclusion reached it is not deemed necessary to consider other questions presented. The judgment is reversed, with instructions to the trial court to sustain appellant's motion for a new trial and to grant leave to appellee to amend her complaint if she so desires.

Spencer, C. J., dissents.

#### DISSENTING OPINION.

SPENCER, C. J.—I am unable to concur in the conclusion of my associates that the cases of *Dunham v. Jones* (1915), 184 Ind. 46, 110 N. E. 203, and *Cincinnati, etc., R. Co. v. Gross* (1917), 186 Ind. 471, 114 N. E. 962, should be overruled in so far as they hold that an appellant who fails to demur to a complaint, and thus waives objection to the sufficiency of the facts stated therein, cannot thereafter predicate error on the giving of an instruction which authorizes a verdict on proof of the material allegations of the pleading. I agree with the premise stated in the majority opinion that the act of 1911 (Acts 1911 p. 415, §2, §344 Burns 1914), relative to the pointing out of defects by demurrer, was

intended "to reinforce other statutes providing that, after verdict, pleadings should be deemed amended as to such defects so as to conform to the evidence," and I concur in the further statement that "it was not the purpose to dispense with the proof of facts essential under the law to constitute a cause of action or a cause of defense." If the evidence is insufficient to establish any of such facts, the question may readily be raised in a motion for a new trial, but if, on the other hand, proper proof is made, the case falls within the provisions of §700 Burns 1914, §658 R. S. 1881, and the rule announced in *Union Frat. League v. Sweeney* (1915), 184 Ind. 378, 382, 111 N. E. 305, and similar decisions. The holding in the present case tends materially to weaken, if it does not destroy, the force of the act of 1911 by permitting an indirect attack on a pleading where the right to a direct attack has been waived and the waiving party has elected to sit by and take his chances on a favorable verdict, and it serves also to lessen the beneficent influence of §700, *supra*, and the cases decided thereunder. This court knows judicially that the exact question now under consideration was squarely presented in the Dunham and Gross cases, and the rule therein announced served in no way to jeopardize the substantial rights of any litigant. The present decision, in my opinion, is out of harmony with the act of 1911 and other statutes which have been designed to prevent the reversal of the judgment of a trial court except for substantial error. I concede that instructions such as the one given in this case, and in the Dunham and Gross cases as well, are technically erroneous, but the error, in each instance, relates back to an imperfection in a pleading which has been waived through a failure to demur thereto. That waiver should continue to operate through all subsequent attacks on such pleading, whether direct or indirect, but need not affect

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State, ex rel. v. Griffith, Judge—188 Ind. 167.

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the right to require proof of all facts necessary under the law to establish a cause of action or a valid defense. Any such omission would render a judgment contrary to law and necessitate the granting of a new trial.

NOTE.—Reported in 119 N. E. 484. Complaint, sufficiency, raising for first time on appeal, 3 Ann. Cas. 545, 2 Cyc 691.

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STATE, EX REL. LAWLER, v. GRIFFITH, JUDGE.

[No. 23,531. Filed March 14, 1919.]

EXCEPTIONS, BILL OF. — *Settlement. — Filing. — Nunc Pro Tunc Entry.*—Where the trial court, at the time of the overruling of a motion for new trial, failed to make an order-book entry showing that time was given the defendant to file a bill of exceptions, after the end of the term the only method of correcting the omission, so as to make a bill of exceptions filed after the term a part of the record, was by a motion for a *nunc pro tunc* entry.

Original action by the State of Indiana, on the relation of Cora Lawler, to mandate Francis M. Griffith, as judge of the Jefferson Circuit Court, to sign a bill of exceptions containing the evidence in a case wherein Solomon J. Bear, as receiver of the People's Trust Company, was plaintiff, and the relatrix and others were defendants. *Demurrer to complaint sustained.*

A. J. Shelby and Ira M. Sharp, for relatrix.

Sulzer & Bear, for defendant.

LAIRY, J.—This is an original action in this court by relatrix against Francis M. Griffith, as judge of the Jefferson Circuit Court, to compel him by mandate as such judge to sign a bill of exceptions containing the evidence in the case of Solomon J. Bear, Receiver of the People's Trust Company v. Cora Lawler et al., to be used in presenting the evidence in that case on appeal.

The verified complaint filed in this court shows that the case of Solomon J. Bear, Receiver, v. Lawler was

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State, ex rel. v. Griffith, Judge—188 Ind. 167.

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pending in the Jefferson Circuit Court at the January term, 1918, and that on the thirty-fifth day of that term the case came on for hearing before defendant, as sole judge of that court on issues of fact formed by the pleadings, and that the court, after hearing and considering the evidence, on the following day entered its finding and decree in favor of the plaintiff as receiver. The complaint further alleges that, within thirty days after such decision, relatrix filed her motion for a new trial on the ground that said decision was contrary to law and that it was not sustained by the evidence, and that this motion was argued orally, and the consideration of the motion was taken under advisement by the court, and that on April 15, 1918, said motion was by the court overruled and an exception given.

The complaint further alleges that: "At the conclusion of the argument for a new trial on said 9th day of April, 1918, and at the time said Judge announced that he would take said motion for a new trial under advisement he was then requested by one of the attorneys for the said Cora Lawler in open court that in case the said motion for new trial should be overruled that the proper exceptions should be entered to such ruling, and that time be given to file a bill of exceptions and to put the record in proper shape for appeal of said cause to which said Judge replied that he would not close the door against an appeal; that on said 15th day of April, 1918, the said Judge proceeded to and did overrule said motion in the absence of the attorneys for the said Cora Lawler and without having notified them or either of them that he was intending to make such ruling; that said Judge at the time of making said ruling failed to enter upon the court's docket any entry showing that time was granted said Cora Lawler in which to settle and file her bill of exceptions, which fact was not ascertained or known by the said Cora Lawler or any

of her attorneys until after the close of the March Term, 1918, of said court; that on the 30th day of April, 1918, the attention of said court was called to the fact that the record of said cause failed to show that time had been granted in which to file such bill of exceptions and said court thereupon directed the clerk of said court to insert in the record of said cause immediately following the entry showing the overruling of said motion for a new trial and exceptions thereto a statement as follows: "And 30 days' time is given to the defendant, Cora Lawler in which to file her Bill of Exceptions;" that the said clerk did thereupon write said statement in the record of said cause."

It thus appears that the order-book entry as made at the time the motion for a new trial was overruled does not show that time beyond the term was granted within which to file a bill of exceptions, and that after the expiration of the term the clerk on direction of the judge changed the entry so as to show the granting of such time. When the motion for a new trial was overruled, the case was finally terminated in the trial court, but the court retained jurisdiction of the case and parties during the term. Until the close of the term, the proceedings were *in fieri* and the court had power to make its records speak the truth. After the expiration of the term, however, the proceedings were no longer *in fieri*, and the court had power to change its record only upon evidence in support of a motion for a *nunc pro tunc* entry and after notice to the parties to be affected. *Schoonover v. Reed* (1879), 65 Ind. 313. In the case cited the entry showing the overruling of the motion for a new trial did not show that time beyond the term was granted in which to file a bill of exceptions, but the bill of exceptions filed after the term stated that such time was allowed by the court at the time of the ruling on the motion for a new trial. In that case the court said:



"The grant of leave therefore, to file the bill, should appear upon the record made at the time of the grant; and, where it does not so appear, a *nunc pro tunc* entry of such grant of leave can only be made, as we have seen, upon competent evidence that it was given in term by the court, and omitted to be entered of record. But if the judge, sixty or any other number of days after the expiration of the term, can insert, of his own volition, a binding statement that such leave was given, then he can, in effect, supply *nunc pro tunc* entries after the proceedings have ceased to be *in fieri*, without proof of any kind, which we have seen he cannot do."

Under the showing made by the complaint the judge properly declined to sign the bill of exceptions presented, and he cannot be compelled by mandate to do so. The demurrer of the defendant to the complaint is sustained.

NOTE.—Reported in 122 N. E. 417.

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### SOLIMETO v. STATE OF INDIANA.

[No. 23,411. Filed March 25, 1919.]

1. CRIMINAL LAW.—*Appeal.—Briefs.—Sufficiency.*—Where a defendant in a criminal case sets out in his brief as error the overruling of motions to quash the affidavit, to continue the cause, and for new trial, but sets out neither a copy of the affidavit nor copies of such motions, the brief is insufficient to present error under the fifth clause of Rule 22 of the Supreme Court, which requires a concise statement of so much of the record as presents every error relied on. p. 171.
2. CONSTITUTIONAL LAW.—*Legislative Power.—Encroachment on Judiciary.—Rules of Court.*—The Supreme Court has power to make its own rules as to briefs and as to the conduct of business before the court, and §3, Acts 1917 p. 523, in so far as it refers to rules relative to the sufficiency of briefs and the pointing out of defects therein, is void. p. 171.

From the Monroe Circuit Court; *Robert W. Miers*, Judge.

Prosecution by the State of Indiana against Vito Solimeto. From a judgment of conviction, the defendant appeals. *Affirmed.*

*T. J. Loudon*, for appellant.

*Ele Stansbury*, Attorney-General, *Q. Austin East*, *Elmer E. Hastings*, and *Dale F. Stansbury*, for the state.

TOWNSEND, J.—Appellant was convicted on an affidavit filed in the lower court for a violation of what is commonly known as the “Blind Tiger” Law. Errors set out in his brief are: (1) The court erred in overruling appellant’s motion to quash the affidavit. (2) The court erred in overruling appellant’s motion for a continuance. (3) The court erred in overruling appellant’s motion for a new trial.

Appellant does not set out in his brief a copy of the affidavit, a copy of his motion to quash, a copy of his motion for a continuance, or a copy of his motion

1. for a new trial. Section 5 of Rule 22 requires that the briefs shall set out a concise statement of so much of the record as presents every error and exception relied on. This rule of court has been effective since November 26, 1900, and it has been held in innumerable decisions of this and the Appellate Court that briefs must be so prepared that each member of the court may be able to understand the questions presented without referring to the transcript.

It may be that appellant was relying upon §3 of chapter 143, Acts 1917 p. 523. So far as this act refers to the rules of this court and what shall

2. be deemed a sufficient brief, and when defects in such brief shall be pointed out, the same is void. This court has power to make its own rules as to briefs, and as to the conduct of business before the court. It is not a legislative function to make rules for the court, or to say what the court shall consider a suf-

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Heier v. State—188 Ind. 172.

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ficient brief. This court will have to be the judge of how it can best expedite business, and how questions can best be presented by briefs so that each member of the court may have an opportunity, if necessary, to consider particularly each case. So far as briefing is concerned, it will be well for litigants to proceed as they have heretofore under the rules made by this court.

Appellant's brief herein presents no questions, and the judgment of the trial court is therefore affirmed.

NOTE.—Reported in 122 N. E. 578. Rules of court: construction of, 41 Am. St. 645; validity of court rule in contravention of statute, 19 Ann. Cas. 801. See under (2) 12 C. J. 827.

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### HEIER v. STATE OF INDIANA.

[No. 23,438. Filed March 25, 1919.]

CRIMINAL LAW.—*Sentence.—Place of Imprisonment.—Objection.*

—A defendant, convicted of violating the "Blind Tiger" Act, should have presented the alleged error that he was sentenced to the county jail instead of the penal farm by a motion to modify the judgment and not by a motion for new trial.

From Marion Criminal Court (48,042); *James A. Collins*, Judge.

Prosecution by the State of Indiana against Fred Heier. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Roemler & Chamberlain*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

TOWNSEND, J.—Appellant was convicted of a violation of what is commonly known as the "Blind Tiger" Law and sentenced to pay a fine of \$100 and imprisoned in the county jail for thirty days.

It is his contention that he should have been sentenced

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Sperry & Hutchinson Co. v. State—188 Ind. 173.

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to the penal farm. He attempts to present this question by a motion for a new trial.

An objection to place of imprisonment should have been presented by a motion to modify the judgment. *Hunt v. State* (1917), 186 Ind. 644, 117 N. E. 856.

Judgment affirmed.

NOTE.—Reported in 122 N. E. 578. See 97 Am. St. 371, 16 C. J. 1314.

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SPERRY AND HUTCHINSON COMPANY v. STATE OF  
INDIANA.

[No. 23,417. Filed March 25, 1919.]

1. CONSTITUTIONAL LAW.—*Police Power.—Trading Stamps.*—The practice of furnishing, using and redeeming trading stamps is subject to regulation and license under the police power of a state. p. 177.
2. CONSTITUTIONAL LAW.—*Due Process.—Regulation of Trading Stamps.*—Legislation regulating, and requiring a license for, the handling of trading stamps is not such an interference with the rights of citizens to pursue a legitimate business or a lawful calling as to be a denial of due process of law within the meaning of §1 of the fourteenth amendment to the federal Constitution. p. 178.
3. CONSTITUTIONAL LAW.—*Validity of Act.—Legislative Power.*—Where doubt exists as to whether a business is subject to regulation under the police power, the determination of the question is within the province of the legislature; and the judgment of the court should be substituted for that of the legislature only where the legislation is purely arbitrary and without reason. p. 179.
4. COURTS.—*Construction of Federal Constitution.—Supreme Court Opinions.*—The construction placed upon the provisions of the federal Constitution by the Supreme Court of the United States is adopted by the courts of the several states. p. 179.
5. COURTS.—*Decisions.—Federal Supreme Court.—Effect on State Courts.*—A decision of the federal Supreme Court sustaining the validity of a state statute, though not binding on the state courts, where the statute is attacked as being in conflict with a similar provision in a state constitution, is strongly persuasive as authority and is generally followed. p. 179.

6. **CONSTITUTIONAL LAW.—Classification.—Legislative Power.**—The legislature has power to make a reasonable classification of persons for purposes of legislation, and to determine in the first instance what classification is just and reasonable in view of the purposes of the legislation; and the classification by the legislature will be sustained by the court, unless it is so manifestly arbitrary that reasonable minds could not differ on the subject. pp. 181, 182.
7. **CONSTITUTIONAL LAW.—Legislative Classification.—License.—Validity.—Trading Stamps.**—The classification in chapter 184, Acts 1915 p. 674, providing for the licensing of only such corporations as are organized for the purpose of redeeming trading stamps, etc., in cash or in merchandise not the product of its own manufacture, and applying in like manner to individuals so engaged, but not applying to other corporations or persons, is so arbitrary and unreasonable as to render the act void under the fourteenth amendment to the federal Constitution and under Art. 1, §23, of the state Constitution, since the public morals and the public welfare, in the interest of which such a classification must be made, would be no more injuriously affected by the business conducted by one class than by that of the other. p. 181.

From Decatur Circuit Court; *John W. Donaker*, Judge.

Prosecution by the State of Indiana against the Sperry and Hutchinson Company. From a judgment of conviction, the defendant appeals. *Reversed.*

*Pickens, Cox & Conder, Wickens, Osborn & Hamilton, L. C. Cravens and Frank T. Alcott*, for appellant.

*Ele Stansbury*, Attorney-General, *Tremain & Turner, Charles Wesley Dunn, Elmer E. Hastings, and Dale F. Stansbury*, for the state.

**LAIRY, J.**—Appellant was charged and convicted of violating the provisions of an act of the general assembly entitled "An Act regulating and providing a license for the handling of trading stamps, coupons and other similar devices." Acts 1915 p. 674.

Section 1 of the act provides: "That every person, firm or corporation, who shall sell or furnish for use in,

with or for the sale of any goods, wares or merchandise, any trading stamps, coupons or other similar devices, which are given free with the purchase of any goods or exchanged for any labels or trade marks of manufactured goods and redeemed for money, premiums, or other values by individuals or corporations organized for the purpose of such redemption and who are not manufacturers of products for which they are given or exchanged, which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure or receive from any person, firm or corporation any money, goods, wares or merchandise free of charge upon the surrender of any number of said trading stamps, coupons or other similar devices, shall before so furnishing, or selling the same, obtain a separate license from the treasurer of the county wherein such furnishing or selling shall take place, for each and every store or place of business in that county in which such trading stamps, coupons or other similar devices are offered to the consumer or dealer." Section 2 of the act provides for the issuing of licenses and for a license fee of \$1,000 for each license issued. Section 4 provides a penalty for the violation of any of the provisions of the act.

The first count of the affidavit charged that appellant, at the time and place stated therein, did unlawfully sell to Roy C. Kanouse certain trading stamps, at a price not known to affiant, to be given free with goods and merchandise purchased from said Roy C. Kanouse and redeemable for premiums, appellant not having a license at the time as provided by the act, and not being the manufacturer of the products for which such trading stamps are given or exchanged. The second count differs from the first in two particulars. It does not charge that appellant sold trading stamps to Roy C. Kanouse, but it charges that appellant did furnish such

trading stamps to him for use in the sale of certain goods and merchandise of the said Roy C. Kanouse. It does not charge that such trading stamps were to be given free by Kanouse with merchandise sold.

The errors assigned are that the trial court erred in overruling appellant's motion to quash the affidavit and in overruling its motion for a new trial.

The motion to quash the affidavit is based on the ground as asserted by appellant that the act on which it is based is void for the reason that it conflicts with the fourteenth amendment to the federal Constitution and also violates certain provisions of the Constitution of this state.

The first attack made on the validity of the act is based on the general proposition advanced by appellant that the furnishing of trading stamps to merchants which are to be given free to the purchaser with merchandise sold, and which are to be redeemed by any individual or any corporation organized for the purpose of such redemption, and which entitle the purchaser receiving the same to procure money, goods or merchandise free of charge by surrendering a certain number of such trading stamps, is a proper and honest business enterprise in which any person or corporation has a natural right to engage within the meaning of §1, Art. 1, of our state Constitution. It is also asserted that the act violates §1 of the fourteenth amendment of the federal Constitution, for the reason that the right of a citizen to engage in a proper and legitimate business is a privilege or an immunity of citizenship which cannot be denied or abridged by a state law.

In support of the proposition that the transactions at which the statute is aimed are of such a nature that they are not subject to be regulated, controlled or forbidden by legislation enacted in the exercise of the police power, appellant contends that the business has no tend-

ency to affect the public health, the public safety or the public morals, comfort or welfare. It is contended that the business which the act seeks to regulate has no tendency to deceive or defraud any one, and that it does not appeal to the gambling instinct by offering prizes to be disposed of by chance or by a lottery scheme or gift enterprise. On the other hand, it is asserted that the merchandise or cash, received in exchange for trading stamps given with the sale of goods, represents a discount allowed to the purchaser as a cash customer, and that it is beneficial both to the merchant and to his customer, in that it increases the cash sales of the merchant, thus assisting him in taking advantage of trade discounts, and, at the same time, it enables the customer to acquire trading stamps, which represent his discount for cash on small purchases as well as upon those for larger amounts.

Prior to the decision by the Supreme Court of the United States in the case of *Rast v. Van Deman, etc., Co.*

(1915), 240 U. S. 342, 36 Sup. Ct. 370, 60 L.

1. Ed. 679, L. R. A. 1917A 421, Ann. Cas. 1917B

455, most of the decisions on the subject by the state and federal courts sustained the position of appellant by holding that the practice of furnishing, using and redeeming trading stamps in the manner described was a legitimate business not intrinsically so inimical to good morals and public welfare as to subject it to regulation or suppression under the police power of the state. *Humes v. City of Little Rock* (1898), (C. C.) 138 Fed. 929; *State, ex rel. v. Sperry, etc., Co.* (1910), 110 Minn. 378, 126 N. W. 120, 30 L. R. A. (N. S.) 966; *People v. Gillson* (1888), 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465; *Ex Parte McKenna* (1899), 126 Cal. 429, 58 Pac. 916. Other authorities less numerous are found to the contrary. To this class belong the cases

VOL. 188—12



of *Rast v. Van Deman, etc., Co., supra; Tanner v. Little* (1915), 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691, and *Pitney v. Washington* (1915), 240 U. S. 387, 36 Sup. Ct. 385, 60 L. Ed. 703.

The federal Constitution provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

2. States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. §1, 14th amendment to federal Constitution. In the cases last cited the Supreme Court of the United States considered the effect of these provisions of the federal Constitution and their application to laws of states by which the use, distribution and redemption of trading stamps or similar devices in the sale of merchandise were regulated or in effect forbidden by the exaction of a prohibitory license. In the first one of these cases, the court refers to the fact that statutes of the character under consideration had been passed in a great number of the states of the union, and that, in view of the decisions of courts which had passed on the question, the weight of authority was in favor of the proposition that such legislation constitutes an unwarranted interference with a lawful calling, and deprives citizens of the United States of their right to pursue a legitimate business of their own selection, thus depriving them of their liberty without due process of law within the meaning of the fourteenth amendment to the Constitution. The court says: "We appreciate the seriousness of the situation. Regarding the number of cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion."

The court then proceeds to hold that the business which the statute under consideration is intended to

regulate is one which may be regarded as inimical to good morals and public welfare; and that, in doubtful cases, it is the province of the legislature to decide whether it is so or not. The court says: "Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chic. Burl. & Quincy R. R. Co. v. McGuire* (219 U. S. 549) and *German Alliance Ins. Co. v. Kansas* (233 U. S. 389), *supra*. And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation." It is conceded by the court in the decision under consideration that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. It is said: "This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance." The opinion seems to rest on the proposition that the judgment of the court in such cases is supreme and should be substituted for that of the legislature only when the action of the legislature is clearly supported by no reason and is purely arbitrary; in other words, where the question is so free from doubt that no sound reason can be found to support an opposite conclusion. The court says: "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of courts to arbitrate in such contrariety."

In construing and applying the provisions of the federal Constitution, the courts of the several states adopt the construction placed on such provisions by the

4. Supreme Court of the United States. *Rothschild & Co. v. Steger Piano Co.* (1912), 256 Ill. 196, 99 N. E. 920, 42 L. R. A. (N. S.) 793, Ann. Cas. 1913E 276; *People, ex rel. v. Wemple* (1893), 138
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N. Y. 1, 33 N. E. 720, 19 L. R. A. 649. It is the province of the state courts to interpret and apply the provisions of their state constitutions, but where a provision of a state constitution is similar in meaning and application to a provision of the federal Constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts on the subject involved. While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the fourteenth amendment is not absolutely binding on the courts of the state when the statute is attacked as being in conflict with a provision of the state constitution having the same effect, still, the federal decision in such cases is strongly persuasive as authority, and is generally acquiesced in by the state courts. 6 R. C. L. p. 84, §83; *Hammond Packing Co. v. State* (1907), 81 Ark. 519, 100 S. W. 407, 1199, 126 Am. St. 1047; *State v. Ardoin* (1899), 54 La. Ann. 169, 24 South. 802, 72 Am. St. 454. Regardless, however, of any of the considerations just mentioned, the court in this case is impelled to follow the federal decisions cited as a matter of principle. It is in full accord with the propositions announced therein and with the conclusions reached.

Having disposed of the first question adversely to appellant, the court is confronted by another objection which assails the validity of the act in question at a point more vulnerable. Even though it be conceded or decided that the business against which the act under consideration is directed is of such a nature as to subject it to regulation under the police power, still that power must be exercised in a valid manner, and the act by which such regulations are imposed must be so framed as not to violate any restrictions imposed by the state or federal Constitutions. It is asserted by appellant that the act as framed denies to it the equal protec-

tion of the law in violation of the fourteenth amendment, and that it violates §23 of the Bill of Rights of the state Constitution, which provides that the general assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens.

It is well settled that the legislature has power to make a reasonable and proper classification of persons for purposes of legislation, but that such classi-

6. fication must not be capricious or arbitrary. To be valid, such a classification must be based on some justifiable distinction when considered in the light of the purposes and objects of the act involved. *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 674, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Dixon v. Poe* (1902), 159 Ind. 492, 65 N. E. 518, 60 L. R. A. 308, 95 Am. St. 309.

The act under consideration makes it unlawful for the persons and corporations to which it applies to engage in the distribution and redemption of trad-

7. ing stamps, coupons or other like tokens, symbols or devices, without first procuring a license at a cost which is admitted to be prohibitory, and provides that any person or corporation violating the act shall be punished by a heavy fine. As the court understands the act, it applies only to corporations which are organized for the purpose of redeeming trading stamps or other like symbols, either in cash or with articles of merchandise not the product of its own manufacture, and to individuals so engaged where the trading stamps or other symbols used are redeemed in like manner, while all other persons or corporations may engage in such business without let or hindrance.

In making a classification for legislative purposes it is the province of the legislature in the first instance to determine what classification is just and reason-

6. able in view of the purpose to be accomplished; and the court will not lightly substitute its judgment on such question for that of the legislature. A classification made by the legislature will be sustained by the courts, unless it is so manifestly and unmistakably arbitrary as to leave no room for reasonable minds to differ on the subject. It is not enough that differences of opinion may exist, and that cogent reasons may be urged against the classification adopted. Every presumption is in favor of the validity of the act. If any state of facts within the fair range of probability can be reasonably supposed, which would supply an adequate reason on which to base the classification made, such state of facts will be assumed to have existed when the law was enacted. *Lindsley v. Natural Carbonic Gas Co.* (1910), 220 U. S. 61, 78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C 160; *Rast v. Van Deman, etc., Co.*, *supra*.

An act of the kind under consideration can be justified only on the theory that the business against which it is directed was of such a nature as to affect and

7. to influence injuriously the public morals and the general welfare of society, and that the purpose of passing the act was to shield the public from the evil potentialities of the business. Considering the classification made in the light of the avowed purpose and object of the act, it is difficult to assume a state of facts which would afford a reasonable ground upon which to base a distinction between the classes formed by the act. Let us suppose that two corporations are engaged in the business under discussion, one of which is organized for the purpose of conducting such business and of making the redemption contemplated with money or with articles of merchandise acquired by purchase, while the other corporation is organized for the purpose of manu-

facturing, and it makes the redemption in articles which are the product of its own manufacture. If the supposed business of each be considered from the standpoint of the effect on the public morals and the general welfare of society, can it be said for any conceivable reason or under any supposable state of facts that the business conducted by the former is more deleterious in its effects on society than that conducted by the latter? The classification adopted must rest on some reason which inheres in the subject-matter with which the legislation deals. The reason must be substantial and not merely artificial. *Bedford Quarries Co. v. Bough, supra*. The court can conceive of no reason upon which the classification adopted in the act can be sustained. Certainly no reason can be suggested resting on any consideration of public morals or general public welfare, and reasons based on any other considerations would be without force.

For the reasons stated, the statute on which the affidavit was based is void. The judgment is reversed, and the trial court is instructed to sustain appellant's motion to quash the affidavit.

Harvey, C. J., not participating in consideration or decision.

**NOTE.**—Reported in 122 N. E. 584. Regulations as to trading stamps, prizes and gifts, 78 Am. St. 267, 12 C. J. 921, 1280, 38 Cyc 927. When a decision of the United States Supreme Court is not binding on state courts, Ann. Cas. 1913E 281. See under (3) 12 C. J. 794; (4) 15 C. J. 931; (5) 15 C. J. 929; (7) 12 C. J. 1155.

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Bleiweiss v. State—188 Ind. 184.

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## BLEIWEISS v. STATE OF INDIANA.

[No. 23,386. Filed April 25, 1918. Rehearing denied  
March 27, 1919.]

1. CRIMINAL LAW.—*Appeal.* — *Briefs.* — *Sufficiency.*—Where an appellant in a criminal case fails to group his points and authorities under proper headings, or to apply his propositions to the particular circumstances in issue, the Supreme Court, under the rules of briefing, would be justified in affirming a judgment of conviction. p. 185.
2. ASSAULT AND BATTERY.—*Striking with Automobile.*—*Intent.*—An assault and battery may be committed by striking another with an automobile, where there is a criminal intent. p. 185.
3. ASSAULT AND BATTERY.—*Striking with Automobile.*—*Intent.*—In a prosecution of a defendant for assault and battery for striking another with an automobile, the element of intent may not be implied from the lack of ordinary care, but it may be implied from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict the injury, or from the commission of an unlawful act that leads directly to the injury. pp. 185, 187.
4. CRIMINAL LAW.—*Appeal.* — *Review.*—*Intent.*—*Proof.*—Where there is evidence in the record tending to show that the defendant, while operating an automobile in violation of §10476c Burns 1914, Acts 1913 p. 779, §14, and, with a reckless disregard for the safety of others, struck the defendant, who was on a motorcycle, there was sufficient showing to present an issue of fact as to the element of intent, and in such case the Supreme Court will not disturb the judgment. pp. 186, 188.
5. CRIMINAL LAW.—*Appeal.* — *Review.* — *Evidence.*—*Weight.* — The Supreme Court will not disturb a judgment of conviction in a criminal case for insufficiency of evidence unless there is an entire failure of proof upon an essential element of the offense. p. 187.

From the Marion Criminal Court (46,375) ; *James A. Collins*, Judge.

Prosecution by the State of Indiana against Maurice Bleiweiss. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Quincy A. Myers, Edward E. Gates and Samuel M. Ralston*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings*, and *Dale F. Stansbury*, for the state.

SPENCER, C. J.—Appeal from a judgment of conviction based on an indictment which charges appellant with the offense of assault and battery. The assignment of errors contains two specifications, one of which is directed against the sufficiency of the indictment and the other challenges the action of the lower court in overruling appellant's motion for a new trial.

That motion contains four grounds but, in the preparation of his brief, appellant has failed to group his points and authorities under proper headings as

1. required by Rule 22 and his several propositions of law, which are ten in number, are stated in abstract form and practically without reference to the particular circumstances in issue. Under the rules governing the preparation of briefs, we would be justified in affirming the judgment of the trial court without further comment, but we have taken occasion to examine the principal questions discussed by counsel in argument and find that their solution requires a consideration of the evidence introduced at the trial.

From that evidence it appears that appellant, while driving an automobile over one of the principal streets in a residence section of the city of Indianapolis,

2. struck a motorcycle on which the prosecuting witness was riding and caused him severe injuries. The testimony on some of the material
3. issues is in conflict, but there is evidence from which the trial court may have concluded that appellant's machine was moving at a speed of about thirty-five miles an hour and that he was not exercising proper care for the safety of other persons who might be using the street. There can be no doubt that an assault and battery may be committed by striking another



with an automobile (*Luther v. State* [1912], 177 Ind. 619, 624) although, of course, there must be some evidence of a criminal intent. "But the intent may be inferred from circumstances which legitimately permit it. Intent to injure may not be implied from a lack of ordinary care. It may be from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury, or the commission of an unlawful act which leads directly and naturally to the injury." *Luther v. State, supra*, 625.

The issue of intent is a question of fact to be determined by the court or jury trying the case from all the evidence given at the trial, and where there is sufficient evidence to present an issue of fact on that question, the finding of the court or jury thereon will not be disturbed on appeal. *Schneider v. State* (1914), 181 Ind. 218. There is evidence in this case which tends to show that appellant was operating his machine in violation of §10476c Burns 1914, Acts 1913 p. 779,

4. §14, and with a reckless disregard for the safety of others. Under such circumstances the finding of the trial court must be sustained.

Judgment affirmed.

Lairy and Myers, J J., concur in conclusion.

#### ON PETITION FOR REHEARING.

WILLOUGHBY, J.—In this case the appellant has filed a petition for rehearing, and claims that the evidence does not sustain the judgment. In the original opinion the court waived the infirmities in appellant's brief, and considered the questions discussed, one of which was the sufficiency of the evidence to sustain the judgment. The appellant claims that under the evidence the court was not warranted in finding any criminal intent on the part of this defendant.

This court will not disturb a verdict in a criminal case on the weight of the evidence. It is only where there is an entire failure of the evidence to sustain the

5. finding or the verdict on some material point that the Supreme Court will reverse the judgment on account of insufficient evidence. *Lee v. State* (1900), 156 Ind. 541, 60 N. E. 299; *Shular v. State* (1902), 160 Ind. 300, 66 N. E. 746; *Keith v. State* (1901), 157 Ind. 376, 61 N. E. 716.

In *Luther v. State* (1912), 177 Ind. 619, 625, 98 N. E. 640, 642, the court said: "Intent on the part of the person charged, to apply the force constituting the battery, is, however, an essential element of the offense (of assault and battery) \* \* \*.

But the intent may be inferred from circumstances which legitimately permit it. \* \* \* It may be from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury, or the commission of an unlawful act which leads directly and naturally to the injury." In that case the court in discussing this principle said: "The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong." In *Schneider v. State* (1913), 181 Ind. 218, 104 N. E. 69, the court said: "Intent in a criminal case is a question of fact to be determined by the court or jury trying the case, from all the evidence introduced on the trial, and where there is some evidence sufficient to present an issue of fact, and that issue having been decided by the court or jury to which it was submitted, this court has no power to question that finding." In this case the appellant testified: "I quite frequently pass by Sixteenth and

Central. I certainly know it is a very dangerous corner. I believe that is a closely built up portion of the city. I was not familiar with the exact figures of the speed law, but I have been told it was fifteen miles an hour." A policeman, who was stationed at that place, and who witnessed the collision, testified: "I noticed an automobile coming north on Central avenue. The defendant was driving it. When I first saw the automobile it was about two squares south of place of collision, at Fourteenth street. I noticed it was coming at pretty high speed and at Sixteenth street it was going at thirty-five miles an hour. As automobile neared Sixteenth street there was no signal at all." Another witness testified that the automobile struck the motorcycle, and dragged the fellow under the machine, and also the motorcycle. The brake was thrown on the automobile right at south side of Sixteenth street on Central avenue, and the machine ran eighty-seven feet before it stopped. Another witness testified: "Comparatively speaking, I would say the automobile was going about as fast as the fire department runs. I would not try to put it in miles. I was coming up Sixteenth street and I looked and saw the automobile dash out and crash into it. I saw the collision. I saw the automobile dash into something, and then something fly up in the air." Another witness testified: "I saw the collision. I first saw the automobile between Fifteenth and Sixteenth streets, and saw it up to the time of collision. My opinion is it was going about thirty-five miles per hour."

From the evidence it is clear that the defendant knew that the place was a dangerous place; that it was a closely built up portion of the city. Notwith-

4. standing that, he was running his car at a reckless and dangerous rate of speed. He was running with a reckless disregard for the safety of others.

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Mishler v. Chicago, etc., R. Co.—188 Ind. 189.

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The law holds him to have intended the natural and probable consequences of his unlawful and reckless acts. The evidence is sufficient.

Petition for rehearing is overruled.

NOTE.—Reported in 122 N. E. 577. Criminal law: liability of owner or driver for injuries inflicted by automobile, 18 Ann. Cas. 239, Ann. Cas. 1914A 684.

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### MISHLER v. CHICAGO, SOUTH BEND AND NORTHERN INDIANA RAILROAD COMPANY.

[No. 23,561. Filed April 3, 1919.]

1. **APPEAL.—Review.—Preservation of Grounds.**—Where appellant failed to present objections to an instruction in his motion for new trial, the instruction will not be reviewed on appeal. p. 191.
2. **APPEAL.—Review.—Motion for New Trial.—Grounds of Review.**—Where no question was presented by the appellant's motion for new trial, alleged error "in permitting a witness to testify as an expert" presents no question for review. p. 191.
3. **APPEAL.—Review.—Erroneous Instructions.—Reversible Error.**—Where an examination of the evidence and interrogatories set out in a brief makes it clear that the verdict is right, instructions would have to be very erroneous to present reversible error. p. 191.
4. **CARRIERS.—Existence of Relation of Passenger.—Instruction.**—In an action for injuries, where the complaint alleged that the plaintiff boarded the defendant's car at a regular stopping place, that the car was so crowded that he could not obtain a seat, and that the jolting and swaying of the car, due to rough and uneven tracks, threw him from the platform, an instruction as to whether the plaintiff could become a passenger if he boarded the car, or attempted to do so, while it was in motion and without the knowledge or consent of the defendant or its agents, was proper, in view of the jury's special verdict showing that only six persons were on the car, none of whom was on the platforms or in the aisles, and the plaintiff attempted to board the car at a place that was not a regular stopping place, and while it was in motion, and that he missed his footing and fell to his injury. p. 193.
5. **CARRIERS.—Duty to Prospective Passenger.—Boarding Moving Car.**—The defendant street car company owed the plaintiff

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Mishler v. Chicago, etc., R. Co.—188 Ind. 189.

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no duty as to the smoothness of its tracks over a railroad crossing while he was attempting to board a moving car, the crossing being a point where ordinary prudence would dictate that the car should be kept moving. pp. 194, 197.

6. TRIAL.—*Instructions.—Construction as a Whole.—Degree of Care.*—Where, in a personal injury case, the instructions as a whole define the care that both the plaintiff and the defendant were required to exercise as that which an ordinarily prudent person would exercise under like circumstances, the giving of an instruction containing the expressions “ordinary prudence” and “the care which a ‘prudent person’ would exercise under like circumstances” was not reversible error. p. 195.
7. APPEAL.—*Harmless Error.—Instructions.—Language.*—The verbal niceties and fine distinctions which analytical minds are able to make in the use of words are not to be invoked to hamper trial courts and to work reversals, when it is plain that a man of ordinary understanding would not be misled. p. 195.
8. APPEAL.—*Erroneous Instructions.—Harmless Error.*—An instruction, in a personal injury case, which told the jury that, though intoxication of the plaintiff would not of itself prevent a recovery, but that evidence of intoxication has a bearing on the question whether he exercised the care and caution required of him as a “sober man,” was not prejudicial, where the jury was asked whether the plaintiff was intoxicated and answered, “Not sure.” p. 195.

From Kosciusko Circuit Court; *Francis E. Bowser*, Judge.

Action by John Mishler against the Chicago, South Bend and Northern Indiana Railroad Company. From a judgment for the defendant, the plaintiff appeals. (Transferred from the Appellate Court under §1394 Burns 1914, Acts 1901 p. 565.) *Affirmed.*

*Rose & Symmes*, for appellant.

*Harry R. Wair, Perry L. Turner, Deahl & Deahl* and *W. D. Frazer*, for appellee.

TOWNSEND, J.—This was an action by appellant against appellee for personal injuries. A jury found for the appellee and with the general verdict returned answers to interrogatories. The questions presented arise on a motion for a new trial.

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Mishler v. Chicago, etc., R. Co.—188 Ind. 189.

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Appellant's points in his brief are addressed to error in instructions Nos. 3, 7, 9, 12 and 13, given by the court and, to use the language of appellant's brief, "In

1. permitting a witness to testify as an expert as to the condition of the tracks at the point in question." Appellant's motion for a new trial, as
2. shown by his brief, did not present instruction No. 3 to the trial court. Therefore it cannot be reviewed here. Nor is any question raised on the evidence by appellant's motion for a new trial, so far as appears from the brief. Therefore he presents no question under his last point.

Instructions Nos. 7, 9, 12 and 13 were presented for review to the trial court by the motion for a new trial, and appellant's brief shows an exception to the

3. court's ruling on this motion; but it does not show any exception to the giving of the instructions. Contrary to our custom, we have looked at the transcript and found exceptions saved. We would not have done this in the first instance, because an examination of the evidence and interrogatories set out in the briefs makes it clear that the verdict is right. Hence instructions would have to be very erroneous to cause a reversal. But these instructions have been considered by the Appellate Court in its opinion. Therefore we shall examine them. In order to make this discussion understandable, it will be necessary to take a cursory view of some of the evidence, some of the answers to interrogatories and the allegations of the complaint.

Appellee's street car track is on Main street, a north and south street of the city of Elkhart, and crosses six tracks of the Lake Shore and Michigan Southern Railway Company. The north two are called the old tracks, the next two the new tracks, or Air Line, the next two are freight tracks. About seven or eight feet north of the north rail of the old tracks are gates to stop the

street traffic, and the same distance south of the south rail of the freight tracks are gates for the same purpose. The distance between the north gates and the south gates is approximately 107 feet. These six tracks of the Lake Shore cross the street at an angle north of west and south of east. Street cars going south stop about one-half car length north of the north gates and receive and discharge passengers at this point. The distance from this point to the north rail of the fourth Lake Shore track is between sixty and sixty-five feet. The particular car that appellant attempted to board was going south and made this stop at the north of the gates, the conductor going ahead on the east side of the street to a signal which is located between the old and the new tracks. All of the evidence shows that appellant attempted to board this car while it was passing over the crossing between these gates. The evidence shows, and the jury found by answers to interrogatories, that the car was going four miles an hour over the crossing. The evidence shows, and the jury found by special interrogatory, that appellant attempted to board the car at or near the fourth track from the north, and that he attempted to go onto the front end of the car from the west side; that he caught at the handrail, missed his footing on the step, and fell, the trucks of the car passing over his right leg and left foot. The evidence shows that no one was on the front platform of the car except the motorman; that the motorman had no knowledge of appellant's presence except that he caught a glimpse of his body as he grabbed at the car and fell. At about the moment of appellant's fall, the conductor came from the signal post heretofore mentioned, on the east side of the car, and boarded the rear platform of the car while it was moving four miles an hour, and signaled the motorman that he was on the car, and, at that instant, saw for the first time

appellant's body at the side of and under the rear platform of the car.

The complaint alleges that appellant became a passenger at a regular stopping place just north of the crossing, as the car was starting over the crossing; that the car was crowded, and it was impossible for him to obtain a seat; that the aisles of said car were also crowded; that appellant was standing on the front step of the car and was in the act of stepping on the front platform when the car began to jolt, because of the rough and uneven condition of the tracks over the crossing; that the jolting and swaying of said car was increased by the excessive rate of its speed; that because of the jolting and swaying of the car and unevenness of the track he was thrown off. The jury found by special interrogatory that there were no more than six persons in the car; that nobody was in the aisles or on the platforms; that appellant attempted to board the car, as we have heretofore said, at or near the fourth track south from the north gates; that in attempting to get on the car he missed his hold with his right hand; that he missed his footing on the step and fell.

In the light of this situation, appellant complains of the following instruction: (7) "To become a pas-

senger upon the street car, it was not necessary

4. that the plaintiff had actually boarded the car, bought a ticket, paid his fare, or offered to do so, but it would be sufficient to make him a passenger if he was at a regular stop or station of said car and was in the act of boarding the same with the intention of taking passage thereon, and if in so doing he was injured because of the carelessness and negligence of the company, and without any carelessness or negligence on his part proximately contributing thereto, the defendant would be liable. If you find, however, that



the plaintiff got on the step of said car or attempted to do so at a place not a regular or proper stopping place, while the car was in motion, and without the knowledge or consent of the defendant, or of the employees in charge of said car, he could not thus become a passenger of the defendant company, and if while on said step or in attempting to board said car he was jolted or jarred therefrom by the action of said car and thereby injured, the defendant could not be liable therefor in this action."

Appellant says in his brief that there was a sharp conflict in the evidence in this case on every issue; but we have searched in vain to find any conflict in

5. the evidence on the proposition that appellant attempted to board a moving car at a time when it had passed the north gates and was proceeding over the Lake Shore crossing. If appellant means that there is a sharp conflict in the evidence as to the condition of this crossing, as to its being rough or smooth, that question is wholly immaterial unless and until appellant became a passenger on the car. Appellee owed him no duty as to the smoothness of this crossing while he was attempting to board a moving car not at a stopping point or near a stopping point, but at a point where the car could not stop, and from the very nature of the situation ordinary prudence would dictate that it should be kept moving. The testimony all is, even his own testimony, that he was attempting to board this car while it was going over this crossing. The jury specially found that he did attempt to board it between the third and fourth tracks south of the north gates, and the evidence showed that his reaching for the handrails on the car, and his attempt to put his feet on the step, and his fall, were all one act. In the light of this situation, it cannot be said that the jury misunderstood instruction No. 7, or was in any way misled by it into

the idea that, had he succeeded in getting on the car, he could not have become a passenger. What the instruction means and what the jury must have understood by it was that in his attempt to board a moving car, under circumstances like these, he was employing his own method and taking his own chances, and unless and until he succeeded, appellee, without knowledge of his attempt, owed him no duty. Instructions are for the guidance of a jury of ordinary men, and this instruction, under the circumstances of this case, was a proper instruction.

Appellant complains of the court's instruction No. 9, because it uses the expression "ordinary prudence" and the care which a "prudent person" would exer-

6. cise under the circumstances. The instructions, as a whole, define the care that both the appellant and the appellee were required to exercise

7. as being that which an ordinarily prudent person would exercise in like circumstances. They correctly told the jury what care was required and did not mislead the jury. In fact, the instructions on this subject were more favorable to appellant in some particulars than he deserved. The verbal niceties and fine distinctions which analytical minds are capable of making in the use of words are not to be invoked to hamper trial courts, and to work reversals in this court, when it is plain that a man of ordinary understanding would not be misled.

Appellant next complains of instruction No. 12, which is as follows: "Some evidence has been introduced concerning the plaintiff's condition as to sobriety at

8. the time of his injury. The fact of his intoxication at the time of his injury, if it is a fact, would not of itself prevent his recovery, but that evidence is before you as bearing upon the question whether he exercised the care and caution required of him as a

sober man and in full possession of his faculties and as described in the foregoing instructions. If you find that he was so under the influence of liquor at the time as to render it dangerous, by reason thereof, for him to attempt to board said car, and that he was injured by reason thereof, he could not recover."

It will be conceded that the words "sober man" do not indicate a legal degree of care; that is to say, the care exercised by an ordinarily prudent person in like circumstances. But it will be observed that there is coupled with this, "and as described in the foregoing instructions." The foregoing instructions had told the jury that appellant was only required to use the care that an ordinarily prudent person would use in like circumstances; and in this very instruction itself the jury are told that intoxication would not prevent a recovery. But beyond all this, the jury were asked by a special interrogatory whether appellant was intoxicated, and they answered: "Not sure." So, whatever view may be taken of this instruction, appellant was not harmed by it.

Instruction No. 13 practically set out the situation at this crossing and told the jury that if they found that there were six tracks in three pairs; that trains were running over these tracks; that safety gates were there; that appellee had no stopping place between said gates on said crossing, and after detailing the situation as to the crossing, it then told the jury that appellant had no right whatever to board appellee's car while in motion in the act of running over said crossing between said safety gates, and that they should consider said facts, if the same were established by the evidence, in determining whether the appellant was guilty of contributory negligence in attempting to board the car.

The complaint about this instruction is that it omits the element of the condition of appellee's tracks over

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Public Service Commission v. Cleveland, etc., R. Co.—188 Ind. 197.

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this crossing. In the light of what we have heretofore set out in this opinion, it would appear that appellee owed appellant no duty as to the condition of its tracks at this crossing while appellant was taking chances in boarding a running car on this crossing inside the gates where there was no stopping place to receive passengers. The interrogatories and the evidence show, as we have heretofore indicated, that appellant never was a passenger on this car.

Considering the circumstances of this case as shown by the evidence and shown by the answers of the jury to special interrogatories, it is difficult to conceive how instructions could be erroneous enough to work a reversal of the cause.

The judgment of the trial court is therefore affirmed.

NOTE.—Reported in 122 N. E. 657. Carriers: when intending passenger actually becomes such, 1 Ann. Cas. 605, 9 Ann. Cas. 1104, Ann. Cas. 1917C 1206. See under (2) 14 Ann. Cas. 973; (4) 10 C. J. 1089; (5) C. J. 945.

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PUBLIC SERVICE COMMISSION OF INDIANA v. CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 23,423. Filed December 11, 1918. Rehearing denied April 3, 1919.]

1. PUBLIC SERVICE COMMISSION.—*Findings of Commission.*—*Effect on Appeal.*—Under §6 of the Public Service Commission Act (§5536 Burns 1914, Acts 1913 p. 820), the court to which an appeal is taken from the commission does not sit as a court of review, but the issues are tried *de novo*; hence the court is not bound by the findings of the commission, but should determine the case from the evidence adduced. pp. 200, 202.
2. PUBLIC SERVICE COMMISSION.—*Powers of.*—*Administrative.*—The functions vested by the legislature in the Public Service Commission are administrative in their nature and not judicial. p. 201.
3. APPEAL.—*Review.*—*Weight of Evidence.*—On appeal from a

Public Service Commission v. Cleveland, etc., R. Co.—188 Ind. 197.

judgment of the trial court annulling an order of the Public Service Commission, the Supreme Court will not weigh the evidence. p. 203.

4. **CARRIERS.**—*Through Routes and Joint Rates.*—*Rights of Public.*—*Evidence.*—Where the evidence tended to show that a private company would be the principal, if not the sole, beneficiary of joint rates, between a short freight line and a through railroad, which were sought in a petition before the Public Service Commission, the trial court was justified, on appeal from an order granting joint rates, in annulling the order of the commission on the grounds that it was not required for the benefit of the shippers and receivers of freight. p. 203.

From Marion Circuit Court (27,522); *Louis B. Ewbank*, Judge.

Petition by the Syracuse and Milford Railway Company, and intervening petition by the Sandusky Cement Company, before the Public Service Commission, to require the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to maintain through routes and joint rates with the petitioner. The commission made an order for joint rates, and from a judgment of the trial court annulling the order, the commission appeals. *Affirmed.*

*Ele Stansbury*, Attorney-General, *Hoyt*, *Dustin*, *Kelley*, *McKeehan & Andrews*, and *Bingham & Bingham*, for appellant.

*Frank L. Littleton*, *Forest Chenoweth* and *Charles P. Stewart*, for appellee.

**LAIRY, J.**—On May 3, 1916, the Syracuse and Milford Railway Company filed a petition asking for an order requiring the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to establish and maintain, in connection with the petitioner, through routes and joint rates between Syracuse, Indiana, and all points on the line of the last-named company within the State of Indiana. Thereafter the Sandusky Cement Company, a manufacturer of cement at Syracuse, filed an inter-

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Public Service Commission v. Cleveland, etc., R. Co.—188 Ind. 197.

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vening petition alleging, among other things, that its plant was located on the line of the petitioner, and was served by it, and also by the Baltimore and Ohio Railroad Company; that it shipped large tonnage of its product to points on the line of the Cleveland, Cincinnati, Chicago and St. Louis Railway and was desirous of making use of the facilities for shipment over the lines of the petitioner which would be afforded by the establishment of the through routes and joint rates prayed for in the petition; that the service furnished by the Baltimore and Ohio Railroad Company is inadequate, and that the intervenor cannot ship by way of the lines of the petitioner and those of the Cleveland, Cincinnati, Chicago and St. Louis Railway, in the absence of joint rates, over such lines, for the reason that it is required to pay the cost of transportation over the lines of the petitioner in addition to the rates over the lines of the last-named company from the junction point to the point of destination, which are the same as the joint rate over the Baltimore and Ohio Railroad Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, from the initial point of shipment to the same destination.

After a hearing on the petition and intervening petition, the Public Service Commission made and entered an order classifying the Syracuse and Milford Railway Company as a common carrier possessing the right to have joint rates established with the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and to have a fair division of rates, and the two companies named were directed to establish, publish and put into effect such joint rates within thirty days from the date of the order.

Appellee filed this action in the Marion Circuit Court asking to have said order annulled and set aside. The trial in the circuit court resulted in a finding and judg-

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Public Service Commission v. Cleveland, etc., R. Co.—188 Ind. 197.

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ment in favor of the plaintiff by which the order of the commission was adjudged to be null and void. The Public Service Commission appealed from this judgment, assigning as error that the trial court erred in overruling its motion for a new trial. The reasons assigned in the motion for a new trial were that the decision of the trial court was not sustained by sufficient evidence, and that such decision was contrary to law.

In support of the reasons thus assigned, it is asserted by appellant that the findings of fact made by the Public Service Commission, upon which an

1. order is based, are conclusive on the court if there is substantial evidence to sustain such findings. It seeks to invoke the same rule in favor of findings of the commission which obtains in courts of appeal and error in favor of the findings of trial courts. This contention cannot be sustained, as it is out of harmony with the entire spirit of the act under which such proceedings are conducted. By §6 of the Railroad Commission Act (Acts 1913 p. 820, §5536 Burns 1914), it is provided that any carrier or other party, dissatisfied with any final order made by the commission, may, after its ruling on petition for rehearing and within twenty days from the date of such ruling, begin an action against the commission in any court of competent jurisdiction in any county of this state into or through which any carrier operates to suspend or set aside any such order. It is evident that the court in which such an action is brought does not sit as a court of review to correct errors of the commission; but, on the contrary, it is clear that the court in such action shall hear the case *de novo* and determine it from the evidence adduced at the trial. The same section of the act provides that, in all actions in the courts of this state authorized by this act, the rules of evidence shall be the same as in the trial of civil cases as now provided by law, excepting

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Public Service Commission v. Cleveland, etc., R. Co.—188 Ind. 197.

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as otherwise provided in this act. Under similar statutes, it has been decided that the court in an action brought to set aside an order of the commission was not bound by the findings of the commission, but that it was the duty of the court to determine the case from a consideration of the evidence adduced. *Interstate Com. Comm. v. Louisville, etc., R. Co.* (1912), 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; *Pittsburgh, etc., R. Co. v. Railroad Commission* (1908), 171 Ind. 189, 86 N. E. 328; *Oregon R. & N. Co. v. Fairchild* (1911), 224 U. S. 510, 32 Sup. Ct. 539, 56 L. Ed. 863.

In the case of *Oregon R. & N. Co. v. Fairchild*, *supra*, 526, the court said: "The act further provided that after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the Superior Court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the Commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, 'under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties.'"

It has been frequently decided that the functions vested by the legislature in commissions, such as our

Public Service Commission, are not judicial in

2. their nature, but that they are administrative in character. *Southern Indiana R. Co. v. Railroad Comm., etc.* (1908), 172 Ind. 113, 87 N. E. 966; *Chicago, etc., R. Co. v. Railroad Comm., etc.* (1911), 175 Ind. 630, 95 N. E. 364; *Chicago, etc., R. Co. v. Minnesota* (1889), 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. This being true, it follows that the proceedings before such body are not judicial proceedings, and that their orders



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Public Service Commission v. Cleveland, etc., R. Co.—128 Ind. 197.

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are not judgments, but are administrative orders. Under the statute a party aggrieved by an order of the commission may file an action in court to have the order annulled and set aside. This affords him his first opportunity to have the facts on which the order rests judicially determined. In reaching a judicial determination as to the reasonableness or justness of an order the court could not be bound and controlled by the findings of an administrative body as to the facts on which such order was based. In the case of *Chicago, etc., R. Co. v. Minnesota, supra*, it was held that any order reducing the rates of a railroad company deprived such company of a part of the proceeds of its property, and thus in effect constituted a deprivation of property within the meaning of the fourteenth amendment to the federal Constitution, which inhibits a state from depriving any citizen of property without due process of law. In that case it was held that the questions involved were of a judicial nature, and that the parties interested had a right to a judicial hearing and determination of such questions. It was further decided that a determination by the commission was not of a judicial nature and did not afford due process of law, and that if the order of the commission was held to be conclusive on the courts, and if no provision was made for a judicial hearing and determination of the facts involved, due process of law was denied and the law invalid for that reason.

The fact that there may have been some evidence before the commission to sustain every material fact upon which the order was based could not prevent the

1. court from making such findings as seemed right and just to it after considering and weighing the evidence adduced at the trial; and a decision by the court on a question of fact contrary to that arrived at by the commission would not be contrary to law, even

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Public Service Commission v. Cleveland, etc., R. Co.—128 Ind. 197.

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though there may have been substantial evidence to support the finding of the commission.

The question as to the sufficiency of the evidence to sustain the decision of the trial court still remains for consideration. In passing on this question, this

3. court cannot weigh evidence, but must sustain the decision if there is any substantial evidence on which it can rest. *Indiana Harbor Belt R. Co. v. Public Service Comm.* (1918), 187 Ind. 660, 121 N. E. 540.

There can be no doubt that the evidence is sufficient to justify a finding by the trial court that through routes and joint rates provided for in the order

4. were not necessary in order to serve the needs and to accommodate the reasonable requirements of the shippers and receivers of freight. *Indiana Harbor Belt R. Co. v. Public Service Comm., supra.* The evidence shows that the Syracuse and Milford Railway Company has a capital stock of \$100,000, and that it owns about seven miles of track extending from the town of Syracuse to Deeters. It is further shown that it is equipped with three 20 to 35-ton locomotives and that it has seventy or eighty steel cars for handling marl and clay. They are of six yards capacity for this purpose and ten or twelve tons capacity for other purposes. The company had no standard equipment and the cars described would not pass in general interchange on steam railroads. The road was not equipped for passenger traffic. The principal industry served by the railway company is the Sandusky Cement Company located at Syracuse, which company originally constructed the railway for the purpose of enabling it to transport material to its cement works. The cement company owns all of the capital stock of the railway company, and the president and the treasurer of the cement company are respectively the president and the treasurer of the railway company.

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Prather v. Latshaw—188 Ind. 204.

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The evidence shows that the cement company would be the principal, if not the sole, beneficiary of the joint rates which were sought.

There is other evidence in the record which the trial court may have properly considered as bearing on the question, but without further extending this opinion the court concludes that the evidence was sufficient to justify a finding that the joint rates established by the order were not required for the benefit, accommodation and convenience of the shippers and receivers of freight, but were sought for the private benefit of the Sandusky Cement Company. The decision of the trial court is sustained by the evidence, and is not contrary to law.

Judgment affirmed.

NOTE.—Reported in 121 N. E. 116. Regulation of rates by state, 62 Am. St. 289-304.

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PRATHER ET AL. v. LATSHAW ET AL.

[No. 23,244. Filed April 4, 1919.]

1. *CONTRACTS.—Performance.—Defenses.—Act of God.*—An unprecedented flood that did not render impossible the performance of a contract for the construction of a ditch and levee, though it damaged the work already done, did not excuse the contractor from the completion of the contract. p. 209.
2. *CONTRACTS.—Performance.—Defenses.—Act of God.*—Where an obligation is imposed by law, a failure of performance thereof that is due to an act of God will be excused; but where a party by contract creates an absolute and unconditional obligation, the performance of which rests on himself, he is bound to perform or to answer in damages, notwithstanding any act of God or inevitable accident, because he might have provided against such contingencies. p. 210.
3. *DRAINS.—Contracts.—Recovery of Value of Work After Annulment of Contract.*—Although a bid was attached to a contract for the construction of a ditch and levee showing that the total amount of the bid resulted from a calculation based on a price per cubic yard of earth in the levee, the contract was a unit and required the construction of the entire work; hence the contractor could not, after annulment, recover the value of

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Prather v. Latshaw—188 Ind. 204.

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the work done under §6144 Burns 1914, Acts 1907 p. 508, where its value was exceeded by the cost of its reconstruction after damage by unprecedented flood. p. 211.

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

On petition of Leona Prather and others, opposed by Joseph Latshaw and others, the circuit court ordered the construction of a ditch and levee in Sullivan county, appointed a commission for construction, and let the contract to Edwin E. Watts. After annulment of his contract, Watts filed a petition in the original proceedings for the allowance of a fair price for work performed as provided in §6144 Burns 1914, Acts 1907 p. 508. The court denied the petition and overruled a motion for new trial, and Edwin E. Watts appeals. *Affirmed.*

*Edwin E. Watts, Robinson & Stilwell and Hunt & Gambill*, for appellants.

*Arthur D. Cutler and A. G. McNabb*, for appellee.

LAIRY, J.—Leona Prather and others filed their petition in the Sullivan Circuit Court for a drain and levee in Sullivan county, Indiana. Such proceedings were had as resulted in an order establishing the work and referring the same to Salathiel Boone, as commissioner for construction, who on March 18, 1911, let the contract for the construction of said work to appellant Edwin E. Watts. The contract between Watts and the construction commissioner was in writing, and provided that the contractor should construct and complete the work by January 1, 1912, at and for the price of \$23,634.70. It also provided for a bond to be given by the contractor and for the payment of eighty per cent. of estimates to be made as the work progressed, and the remaining twenty per cent. on completion of the contract.

The contractor failed to complete the work by the

time fixed in the contract, and on February 17, 1912, the construction commissioner granted an extension of time in writing until July 1, 1912. Subsequently to this time the work was sublet by the contractor and a further extension of time for completion was granted to April 15, 1913. In the early days of March, 1913, occurred an unprecedented flood which damaged the work and washed away a large part of the levee which had been constructed under the contract. In November, 1913, Salathiel Boone, having previously resigned as construction commissioner in charge of said work, entered into a contract with appellant Watts, by which he agreed to construct all of that part of the work between station 80 and station 0 at the source of the drain. The work that had been done prior to this was between station 80 and station 209-10, which was the lower terminus of the improvement as planned. The damage caused by the flood of 1913 affected the work constructed between the stations last mentioned.

After the resignation of Boone as superintendent of construction, the court appointed William L. Sisson to that position. On January 30, 1914, Sisson, as superintendent of construction, gave notice, as provided by statute, that on February 10, 1914, he would annul the contract of Edwin E. Watts theretofore existing for the construction of the improvement, and that he would let the contract for the completion of the work to the best bidder. On the day fixed the contract for the completion of the work was let to Salathiel Boone, and on March 6, 1914, Salathiel Boone entered into a written contract and gave bond for the completion of said work.

Section 5 of the act, *supra*, under which the proceedings were instituted, provides for the letting of the contract, the construction of the work and the collection of assessments. This section provides that, in case any contractor shall fail or refuse to construct the part of

the work contracted to him within the time according to the specifications, or should it become manifest that such person would not complete the same or would be unable to complete the same within the time limited or in the manner specified, then the person charged with the construction of such work may annul the contract and let the same to the best bidder, first giving ten days' notice by publication in a newspaper published in the county in which that part of such work lies. It further provides that the contractor so in default shall not again become a bidder for the unfinished portion of the work, but such contractor shall be allowed on his contract a fair price for the work he has performed up to the time his contract is so annulled, such price to be determined by the court establishing such work. §6144 Burns 1914, Acts 1907 p. 508, §5.

Appellant filed a petition in the original proceeding asking that the court, under the provisions of this statute, allow him a fair price on his contract for the work performed by him up to the time when his contract was annulled. He alleged that prior to that time a large amount of the work had been done under his contract, and that he had been allowed and paid only eighty per cent. of the estimated value of the work done, and that the remaining twenty per cent. of the value of the work so done, amounting to \$3,504.03, was still due him and remained unpaid.

It is also alleged that on December 1, 1913, a further extension of time was granted for the completion of the work by William L. Sisson, and that the time so granted had not expired when Sisson, as superintendent of construction, attempted to annul his contract and to relet the same.

After hearing the evidence on appellant's petition, the court refused to allow him anything on his contract. Appellant Watts filed a motion for a new trial on the

ground that the decision of the court was not sustained by sufficient evidence, and that it was not according to law. The court overruled this motion, and this ruling is assigned as the only error on appeal.

The evidence of appellant shows that he claims a balance due him of \$3,501.64 for work done on the Prather levee between station 80 and station 209-10 at the Wabash river. It shows that the levee between those stations was brought up to grade except as to certain creek crossings and road crossings. He testified that there were eleven creek crossings, of which he constructed nine, and that he constructed two of the road crossings. He further testified that the work was measured and the number of cubic yards estimated, and that he was allowed and received eighty per cent. of the estimated value of the work amounting to \$12,929.11, leaving twenty per cent. of the estimated value of the work performed by him still due. Mr. Sisson, the last superintendent of construction, who was also the county surveyor, corroborated the appellant to the extent of saying that the levee between station 80 and station 209-10 was practically brought up to grade by appellant, except as to the creek crossings, and that after deducting 4,000 cubic yards for those crossings the amount of earth claimed by appellant was actually put into the levee; but this witness testifies that, after the levee between those stations was brought up to grade, it was washed away by the flood of 1913, and that at the time he relet the contract to Boone an estimate made by him showed that it would require 24,600 cubic yards of earth to bring the work up to grade between the stations mentioned. There is other evidence showing the extent of damage done to the work between those stations by the flood,—one witness testifying that the levee was almost entirely washed away in places, and that in other places

parts were washed out. The evidence shows that the cost under the contract with Boone of bringing the work up to grade between the stations mentioned would be twenty-five cents per cubic yard, and that 24,600 cubic yards would be required. It thus appears that the cost of restoring and completing the work between the stations mentioned will far exceed the estimated balance claimed by appellant as due him. It further appears by the evidence that the cost of completing the entire work, which appellant agreed to perform under his contract including the part damaged by the flood, will exceed the original contract price, and that an additional assessment has been made on the lands affected to provide for the excess.

The finding of the court is fully sustained by the evidence and is in accordance with the law.

Appellant relies on a proposition of law which, as stated by counsel, is to the effect that a party to a contract is not bound to perform it where perform-

1. ance is rendered impossible by the act of God, by the law, or by the act of the other party to the contract. As sustaining the proposition, he cites a number of authorities. It is asserted that, under the rule announced by the authorities cited, appellant was not bound to repair the loss occasioned by the flood, even though the work to be done under the contract was not completed at the time the loss occurred. The authorities cited can all be distinguished from the case at bar. In this case the flood did not render the performance of the contract impossible. After the flood subsided, there was nothing to prevent appellant from completing the work according to his contract, and he is not excused from doing so on account of the damage occasioned by the flood. *Boyle v. Agawam Canal Co.* (1839), 22 Pick. (Mass.) 381, 33 Am. Dec. 749; *Chap-*  
VOL. 188—14



*man & Co. v. Montgomery Water Power Co.* (1903), 126 Fed. 372, 61 C. C. A. 347.

To say that a party to a contract is excused where performance is rendered impossible by the act of God cannot be regarded as an accurate statement of

2. the law. Where an obligation is imposed by law, as it is in the case of common carriers, the law will excuse where the failure to perform the obligation is due to the act of God. *School District No. 1 v. Dauchy* (1857), 25 Conn. 530, 68 Am. Dec. 371; *Brown, etc., Co. v. Susquehanna Boom Co.* (1885), 109 Pa. St. 57, 1 Atl. 156, 58 Am. Rep. 708. On the other hand, if a party by his contract creates an absolute and unconditional obligation, the performance of which rests on himself, he is bound to make it good or to answer in damages, notwithstanding any act of God or inevitable accident, because he might have provided against such contingencies by his contract. *Mitchell v. Hancock Co.* (1907), 91 Miss. 414, 45 South. 571, 15 L. R. A. (N. S.) 833, 124 Am. St. 706; *Schwartz v. Saunders* (1867), 46 Ill. 18.

Any seeming exception to the rule thus stated will be found to rest on the construction placed on the contract with reference to the subject-matter or on account of the conditions of the parties rather than on a denial of the principle stated. To illustrate, if A contracts with B to build a house according to certain plans and specifications, furnishing all labor and material, the fact that it may be destroyed by an act of God or inevitable casualty when almost completed will not excuse A from the obligation to furnish labor and material and to rebuild it; but, if A contracts to furnish and install an elevator in a building owned by B already in existence, the destruction of the building in which the elevator was to be installed will excuse performance. *Siegel v. Eaton, etc., Co.* (1897), 165 Ill. 550, 46 N. E. 449. The

reason upon which such decisions are based is that the parties in making the contract assumed the continued existence of the building until the completion of the work, and the contract is construed in the light of such assumption. *Krause v. Board, etc.* (1903), 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203.

Attached to the contract of appellant is the bid on which it is based. This shows that the total amount of

the bid was the result of a calculation based on a

3. price of fifteen cents for each cubic yard of earth to be placed in the levee under the plans and specifications. The evidence shows that the estimates were made on the same basis as the bid. Relying on what has just been stated, appellant takes the position that the contract was not a unit, and that he was entitled to recover at the price stated for the number of cubic yards placed in the levee, even though the contract was not completed and a part of the levee was washed away by a flood. This position of appellant cannot be sustained. In a case involving the construction of a contract very similar to this, it was held that the contract required the construction of the entire work included therein. *Boyle v. Agawam Canal Co., supra.* The decision in that case meets with the approval of this court.

The trial court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 122 N. E. 721. Contracts: excuses for non-performance, validity, 18 Am. Dec. 452. See under (2) 13 C. J. 639.

## CITIZENS' BANK OF MICHIGAN CITY v. OPPERMAN.

[No. 22,832. Filed February 13, 1917. Rehearing denied May 18, 1917. Writ of error to U. S. Supreme Court dismissed April 14, 1919.]

1. **APPEAL—Waiver of Error.**—Where the appellant makes no point, cites no authority, and presents no argument as to an assigned error, it will not be reviewed. p. 215.
2. **APPEAL—Harmless Error.—Sustaining Demurrer.**—To constitute reversible error, the sustaining of a demurrer to an answer of estoppel in a replevin action must have been harmful to the defendant by denying him opportunity to prove the matters alleged therein. p. 215.
3. **APPEAL.—Review.—Scope.—Sufficiency of Answer.—Harmless Error.**—Where a demurrer was sustained to a paragraph of answer of estoppel in a replevin action, but the defendant was permitted to prove all the facts alleged therein under the general denial, the Supreme Court will not determine the sufficiency of the answer, nor whether estoppel is provable under the general denial. p. 215.
4. **ESTOPPEL.—Burden of Proof.**—A defendant relying upon estoppel of the plaintiff as a defense has the burden of proving it by a fair preponderance of the evidence. p. 216.
5. **TRIAL.—Given Instructions.—Requests.**—There was no error in refusing requested instructions that were covered in substance by those given. pp. 217, 219.
6. **HUSBAND AND WIFE.—Disabilities of Wife.—Surety for Husband.—Burden of Proof.**—The receipt of the property of a married woman as a pledge for her husband's debt creates a relation of suretyship on her part which is binding on the pledgee, unless the latter shows that she is estopped to assert such suretyship; hence, in an action against the pledgee to recover such property, she need show nothing in the first instance as to the defendant's knowledge of such suretyship. p. 217.
7. **HUSBAND AND WIFE.—Suretyship of Wife.—Constructive Notice.—Facts Putting on Inquiry.**—In an action by a married woman to recover her property on the ground that she allowed it to be pledged by her husband for his debt, the law does not require that the defendant have actual knowledge of the wife's suretyship in order to bar the defense of estoppel, since, if the circumstances were sufficient to put the defendant upon inquiry and the latter failed to inquire, as a reasonably prudent person

would have inquired, knowledge is imputed of all the facts that inquiry would have disclosed. p. 218.

8. EVIDENCE.—*Facts and Conclusions.*—In a replevin action by a married woman to recover bank stock on the ground that she allowed it to be pledged to secure her husband's debt, a question asking the husband whether the wife received anything from the pledgee when he got the stock certificate from her and gave it to the pledgee, was not improper as permitting the witness to decide one of the issues, since it called for a fact. p. 219.
9. EVIDENCE.—*Competency.*—*Admission of Similar Evidence of Adverse Party.*—In replevin by a married woman to recover bank stock on the ground that it was pledged by her husband for his debt, where the defendant pledgee's cashier had testified that he told the husband on delivery of the certificate of stock that it would be better to have it signed on the regular line, it having been signed in the wrong place, the defendant could not justly complain of the plaintiff's testimony that the husband returned the certificate and requested her to re-sign it and that he said when he made such request that "she had not signed it in the right place." p. 219.
10. EVIDENCE.—*Res Gestae.*—*Hearsay.*—In replevin by a married woman to recover bank stock on the ground that she permitted her husband to pledge it for his debt, a conversation between the husband and wife, at the time he applied for the certificate and she signed and delivered it, to the effect that he wanted it to use as security for a loan, and also his statement, when he returned the certificate to have it re-signed, that "she had not signed it in the right place," were a part of the pertinent and material act of the procuring and delivery of the certificate and were admissible as part of the *res gestae*, such statements not being received as conclusive, but to assist in determining the true character of the transaction and as tending to show the intent of the wife in doing the act and that there was no real change of ownership. p. 220.
11. EVIDENCE. — *Parol.* — *Varying Written Instrument.* — In replevin by a married woman to recover bank stock on the ground that she allowed it to be pledged by her husband for his debt, she could explain the purpose and meaning of her written power of attorney and assignment of the stock, subject to the pledgee's right to show estoppel, notwithstanding the rule announced in the federal decisions construing the National Bank Act that an assignment of a certificate of national bank stock is complete without a transfer on the books of the bank. p. 220.
12. HUSBAND AND WIFE.—*Disabilities.*—*Wife as Surety.*—Where it appears that the wife has absolutely and completely parted

with title to property by an executed agreement, and that nothing remains contingent upon the husband's payment of his debts, her conveyance or assignment of property is binding upon her, though the purpose was the actual payment of the husband's debt. p. 221.

13. HUSBAND AND WIFE.—*Disabilities.*—*Suretyship.*—Where the wife simply pledges her property to be used or returned or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate. p. 221.

14. APPEAL.—*Question of Fact.*—*Jury Question.*—Where there was sufficient evidence to raise an issue of fact, the jury's finding thereon in favor of the appellee will not be disturbed on appeal. p. 222.

From St. Joseph Circuit Court; *Arthur L. Hubbard*, Special Judge.

Action by Mary Opperman against the Citizens' Bank of Michigan City. From a judgment for the plaintiff, the defendant appeals. (Transferred from the Appellate Court under §1405 Burns 1914, Acts 1901 p. 590.) *Affirmed.*

*Drummond & Drummond* and *Collins & Collins*, for appellant.

*Osborn, McVey & Osborn* and *Anderson, Parker, Crabill & Crumpacker*, for appellee.

HARVEY, J.—In this action appellee seeks as owner to recover by replevin a certificate for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana. At the first trial the court directed a verdict for the defendant; and from the judgment on this verdict the plaintiff appealed. The Appellate Court reversed the judgment. (*Opperman v. Citizens' Bank* [1909], 44 Ind. App. 401, 85 N. E. 991). Upon the return of the cause defendant filed an amended second paragraph of answer, to which a demurrer was sustained. Upon a trial of the issue formed by the complaint and a general denial the verdict was for the plain-

tiff, and a judgment was entered for the recovery of the certificate, which was found to be of the value of \$3,150.

Defendant appealed to the Appellate Court, and the cause was, under §1405 Burns 1914, Acts 1901 p. 590, transferred to this court. Appellant assigns as error:

(1) The sustaining of the demurrer to the amended second paragraph of answer; (2) the overruling of appellant's motion to modify the judgment; (3) the overruling of appellant's motion for a new trial.

As to the overruling of said motion to modify the judgment, appellant makes no point, cites no

1. authority, and presents no argument, hence the same is not further noticed.

The amended second paragraph of answer alleges in substance, as an estoppel against the plaintiff, that, though the stock represented by the certificate was her separate and individual property, and though she was at the time a married woman, she allowed her husband to pledge the same as collateral to secure three notes upon which he alone was indebted to the defendant; that the plaintiff signed the blank form of assignment and power of attorney printed on said certificate without restrictive conditions; that the husband represented to defendant that he was the owner of said certificate, and defendant had no notice or knowledge that the plaintiff had, or claimed, any interest in said certificate; that defendant never at any time had any contract of suretyship with the plaintiff.

To constitute reversible error, the sustaining of the demurrer to this answer must have been harm-

2. ful to appellant in that appellant was thereby denied opportunity to prove estoppel.

The record discloses that evidence was admitted upon all matters set up in this answer. It does not disclose

that any offered evidence bearing upon an es-  
3. toppel was excluded. The record shows that ap-

pellant tendered and the court gave instructions to the jury covering fully all matters alleged as to estoppel, and covering all the evidence relating thereto. The whole trial appears to have proceeded upon the theory that in actions of replevin all defenses, including estoppel, are permissible under the general denial. As appellant was not so deprived of any advantage, appellant was not harmed, and justice to appellant does not require that this court determine the sufficiency of said answer, nor whether estoppel is provable under the general denial in actions for replevin.

Under the assigned error in overruling the motion for a new trial, appellant claims that the court by instructions Nos. 5 and 6 placed upon appellant the

4. burden of proving the defense of estoppel. The court expressly charged the jury that the burden of establishing her right to recovery of said certificate was upon appellee; and the court expressly charged that the burden of establishing by a fair preponderance of evidence an estoppel as a defense was upon the appellant. This charge was correct as to the burden of proof of an estoppel. *Morgan v. Hoadley* (1900), 156 Ind. 320, 59 N. E. 935; *Waterbury v. Miller* (1895), 13 Ind. App. 197, 41 N. E. 383; *Newcastle Bridge Co. v. Doty* (1906), 168 Ind. 259, 79 N. E. 485; *McAdams v. Bailey* (1907), 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. 240; *Cunningham v. Hoff* (1889), 118 Ind. 263, 20 N. E. 756.

On the face of the pleadings as they stood at the trial, no question of estoppel was in issue, unless the defense of estoppel was permissible under the general denial. But, as we have stated, the issue of estoppel was as fully tried as if it were admissible under the general denial, and as if it were specially pleaded; and an instruction as to the burden of proof of an estoppel was applicable to the situation actually existing at the trial

and to the issue actually presented to the jury. Under these circumstances, there was no error in giving instructions Nos. 5 and 6. *Price v. Hallett* (1896), 138 Mo. 561, 38 S. W. 451; *McDonnell v. DeSoto Savings, etc., Assn.* (1903), 175 Mo. 250, 75 S. W. 438, 97 Am. St. 592.

Appellant claims that the court erred in refusing to give its tendered instruction No. 16, which, after quoting the statute, states that if the jury should find from the evidence that there was a contract of suretyship between the plaintiff and her husband, but that the defendant was not a party to this contract, the jury should find for the defendant.

Assuming for the purpose of the statement that this tendered instruction correctly states the law, the substance of the same is fully covered by appellant's

5. instructions Nos. 12 and 14, which were given by the court, No. 12 stating that it is not enough for the plaintiff to show that as between herself and her husband she is surety, but she must show that the defendant either contracted with her as surety, or that the circumstances were such as to charge the defendant with knowledge of such fact, and No. 14 stating that the plaintiff must show that she entered into a contract of suretyship with defendant, and that the defendant had knowledge of the fact that her connection with the contract was in the nature of a suretyship.

Neither of these instructions tendered or given correctly states the law, each being more favorable than appellant was entitled to, because, in so far as

6. these instructions state that there must exist a contract of suretyship between plaintiff and defendant, they are at least misleading. The fact that the plaintiff is a married woman and that her property is pledged for a debt of her husband creates a relation of suretyship on her part which is binding on defendant,



unless defendant shows that she is estopped to assert such suretyship, and if defendant were a party to the contract of suretyship, an estoppel could not exist. She need show nothing in the first instance as to knowledge by the defendant of her suretyship. *International, etc., Loan Assn. v. Watson* (1901), 158 Ind. 508, 64 N. E. 23. The burden is on the defendant to show an estoppel, and this includes defendant's lack of knowledge or opportunity; and if defendant introduces evidence tending to show an estoppel, then for the first time plaintiff is called upon, in rebuttal, to show that defendant knew or should have known.

Appellant claims error in the court's refusal to give its tendered instruction No. 18. In so far as this instruction is proper, it is covered by instructions Nos. 3, 15, 19 and 20, given by the court at appellant's request. Furthermore, this instruction would have stated to the jury: That if the jury found "that defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make such a contract, nor can knowledge be imputed to it that the certificate was the property of the plaintiff, and that her husband was pledging her property to secure the payment of his debt."

Much less than actual knowledge would charge the defendant. Circumstances might put the defendant upon inquiry; and, if so, the defendant was required

7. to inquire, as a reasonably prudent person would have inquired; and if the defendant failed so to do, knowledge is imputed of all defendant would have learned, and, having such knowledge, the defendant could not assert estoppel against the plaintiff. Therefore there was no error in refusing this instruction.

It is sufficient to say of appellant's assigned error, in the court's refusal to give its tendered instruc-

5. tions Nos. 10, 21, 22, 23 and 24, that they are each fully covered by other instructions given by the court.

The court overruled defendant's objection to the following question propounded to plaintiff's husband as a witness: "At the time you got this certificate

8. from your wife and gave it to Mr. Arnt, did your wife receive anything from the bank for it?"

The ground of the objection stated was that the witness would be thus permitted to decide one of the issues in the case. The question called for a fact as to whether the wife had received anything from the bank. *Baltes Land, etc., Co. v. Sutton* (1903), 32 Ind. App. 14, 20, 69 N. E. 179.

Appellant complains of the ruling permitting the plaintiff to state as a witness what her husband said to her at the time he applied for and she signed and delivered the certificate to him, in substance, that he wanted the certificate to use as security for a loan at the Citizens' Bank, and what he said at the time he returned to her with the certificate and she re-signed it at the place indicated by defendant's cashier, in substance, that she "had not signed it in the right place"; and the appellant further complains of the refusal of the court to strike out some of these items of testimony.

All the alleged errors last above referred to are by appellant, in its points and argument, treated together, and not separately, and this court passes on them in the same manner.

Plaintiff's husband had testified, and appellant's cashier afterwards testified, that the cashier had told the husband that it would be better to have the

9. certificate signed on the regular line. This suggestion resulted in the husband's request of his wife that she re-sign the certificate at the point indicated, because she had not signed it in the right place;

and under these circumstances appellant is in no position to complain that the request was made or that the wife was permitted to testify that the request was made.

Furthermore, as all the conversations objected to were a part of the pertinent and material act of the procuring by the husband and the delivery by the

10. wife of the certificate, they were a part of the *res gestae*, and not hearsay. Such statements are not received as conclusive, but to assist in determining the true character of the transaction. *Creighton v. Hoppis* (1885), 99 Ind. 369; *Fox v. Cox* (1897), 20 Ind. App. 61, 50 N. E. 92; *Baker v. Baker* (1908), 43 Ind. App. 26, 86 N. E. 864. They tended to show the intent of the wife in doing the act. They were made while she was in possession, and they also tended to show that there was no real change of ownership. *McConnel v. Hanna* (1884), 96 Ind. 102. It is not clear that plaintiff may not show a contract between herself and her husband, though made in the absence of the appellant. *Hogue v. McClintock* (1881), 76 Ind. 205, 209.

Another ground of objection to several of the above items is that the plaintiff should not be permitted to deny the purpose and meaning of her written

11. power of attorney and assignment of the stock.

The form of the wife's signed instruments in such cases does not prevent her from showing the real fact and the actual substance, subject to the grantee's right to show estoppel. Much more positive and expressive is a signed and delivered deed of conveyance, and yet the same may be shown to be a mortgage. *Creighton v. Hoppis*, *supra*; *Webb v. John Hancock, etc., Ins. Co.* (1903), 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632. Therefore the rule that, under the construction by the federal courts of the federal National Bank Act, an assignment of a certificate of national bank stock without

transfer on the books of the banking corporation is a complete transfer, vesting title in the transferee, is not in point. Even though the transfer had been made on the bank's books, the plaintiff might, inasmuch as substance and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation, would be pertinent only to the issue of estoppel.

Where, upon all the facts being shown, it appears that the wife has absolutely and completely parted with her title by an executed arrangement, and that noth-

12. ing remains in her contingent upon her husband's paying his debts, her conveyance or assignment will be binding upon her, though the purpose of

13. so doing was the actual paying of her husband's debts. *Rogers v. Shewmaker* (1901), 27 Ind.

App. 631, 60 N. E. 462, 87 Am. St. 274. It will be noted in the case last above cited, and relied upon by appellant, that the wife not only completely and without contingency or condition parted with her title at the time she executed the conveyance in question, but that the property had been actually used for the payment of her husband's debts, and that quite a number of years had elapsed before she sought to set aside the conveyance. But where the fact is that the wife simply pledges her property to be used or returned, or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate. *McCoy v. Barns* (1894), 136 Ind. 378, 36 N. E. 134. Therefore there was no error in overruling appellant's objections, so far as the last-stated ground of objection is concerned.

The remaining assignment of error, in overruling the motion for a new trial, is that the verdict of the jury is

not sustained by sufficient evidence. No point on  
14. this assignment is made in appellant's brief. The record discloses, however, very little dispute as to any material fact, except as to whether defendant was informed by plaintiff's husband before he procured and pledged the stock that the stock belonged to his wife. There was evidence that the defendant was so informed, and this was denied by appellant's cashier. There was sufficient evidence, pro and con, to raise an issue of fact, and this issue was settled by the jury in favor of the plaintiff. Under the well-settled rule this court cannot reverse the judgment on this assignment. *Boland v. Claudel* (1913), 181 Ind. 295, 298, 104 N. E. 577; *Cleveland, etc., R. Co. v. Simpson* (1914), 182 Ind. 693, 104 N. E. 301, 108 N. E. 9.

Finding no error in the record, the judgment of the court below is affirmed.

NOTE.—Reported in 115 N. E. 55. Husband and wife: liability of wife as surety for husband's debt, 27 Am. Rep. 26; conflict of laws as to capacity of wife to become surety for husband, 57 L. R. A. 513, L. R. A. 1916A 1054. Evidence: parol, varying written contract, admissibility, 17 L. R. A. 270; admissibility of parol evidence that a written instrument which on its face imports a complete transfer of interest in property was intended to operate as a pledge or mortgage, L. R. A. 1916B 18. See under (4) 16 Cyc 811; (11) 17 Cyc 672; (12) 21 Cyc 1508; (13) 21 Cyc 1489. Appeal to United States Supreme Court dismissed for lack of federal question, 249 U. S. 448, 39 Sup. Ct. 330.

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### ARNOLD ET AL. v. STATE OF INDIANA, EX REL. DAVIS.

[No. 23,527. Filed April 17, 1919.]

1. MANDAMUS.—*Office.—Possession.*—Mandamus is the proper remedy to obtain possession of an office from a person wrongfully holding over where the facts show that the plaintiff has been legally elected to, and has qualified for, the office. p. 224.
2. ELECTIONS.—*Tie Vote.—Casting Lots.*—Section 15 of Acts 1905 p. 219, §8989 Burns 1914, which provides that, in case of a tie vote for candidates for office in town elections, the inspectors shall determine by lot which of them shall be de-

clared elected, applies to all town elections and not only to the first election following incorporation, in view of §14 and the acts of 1909 and 1911 amending the act of 1905, and there being nothing in the history of the legislation to indicate a different construction. p. 227.

From Vanderburg Circuit Court; *F. M. Hostetter*, Judge.

Mandamus by the State of Indiana, on the relation of Elijah Davis, against James R. Arnold, and others. From a judgment for the relator, the defendant appeals. *Affirmed.*

*John B. Bilderback, David Corn and Harvey Harmon*, for appellants.

*Charles O. Baltzell and Robert C. Baltzell*, for appellee.

LAIRY, J.—This is an appeal from a judgment in favor of appellee in a mandamus proceeding brought to compel appellants to recognize relator as the trustee from the second ward of the town of Oakland City, and to permit him to discharge the duties of that office to which he claims to be legally elected.

The material facts disclosed by the record show that Oakland City is a town in Gibson county having five wards and five town trustees. On November 2, 1915, a general election for municipal purposes was held in Oakland City, at which relator was a candidate for the office of town trustee from the second ward against Walter Turner and William Stewart. The election resulted in a tie vote between relator and Turner, they having received a greater number of votes than Stewart. November 3, 1915, the vote of the two precincts into which the town was divided was canvassed by the election commissioners consisting of the town clerk, Cora Mahall, and Carl Powers and John J. Wallace. After canvassing the vote the result, showing the tie vote between relator and Turner, was certified to the town clerk, who

certified the same to the board of trustees of the town, which board, at a regular meeting, declared by a resolution that no person had been elected as trustee for the second ward. Afterward, on December 20, 1915, the election inspectors met in the presence of the two candidates having the equal number of votes and determined by lot that relator was elected, and so declared, and on the following day a certificate of election was delivered to him, which was filed in the office of the town clerk. On December 25, 1915, relator qualified by taking the oath of office, and on the first Monday in January, 1916, presented himself and demanded the right to perform the duties pertaining to the office of trustee from the second ward of said town. Appellant Arnold, who was trustee of said town from the second ward for the term immediately preceding the term for which relator was declared elected as aforesaid, claimed the right to hold over. The other two appellants, Robert P. Smith and Edward Burkhart, were trustees of said town, as were also Fred Schentrup and Harlan Kays; and when the relator attempted to assume the duties of his office he was prevented from doing so by appellants over the protest of the other two members of the board of trustees.

The facts stated are sufficient for an understanding of the questions involved. The trial court overruled a demurrer addressed to the complaint by appellants, to which ruling an exception was reserved. On request the court found the facts specially and pronounced its conclusions of law thereon in favor of appellee. Exceptions were reserved to the conclusions of law. The questions thus reserved are assigned as error.

Appellants assert that mandamus is not the proper remedy under the facts disclosed, but that question has been decided adversely to appellants by this court.

1. *Couch v. State, ex rel.* (1907), 169 Ind. 269, 82 N. E. 457, 124 Am. St. 221.

The principal point in dispute arises out of the construction to be placed on §8989 Burns 1914, being §15 of an act concerning municipal corporations, Acts 1905 p. 219. Appellants contend that the provision in that section for determining a tie vote by the casting of lots applies only to the first election held after the incorporation of a town, and that it has no application to subsequent town elections. To sustain this position the attention of the court is called to the last provision of that section, which requires that the inspectors make out a certificate showing the persons elected, and file the same with the clerk of the circuit court of the county within ten days after such election, and providing that no act or ordinance of the board of trustees chosen at such election should be valid until the act was complied with in this respect, and also calls attention to two decisions by this court holding that such provision applied only to the first election held pursuant to the incorporation of a town, and not to subsequent town elections. *Low v. Dallas* (1905), 165 Ind. 392, 75 N. E. 822; *Daly v. Gubbins* (1907), 170 Ind. 105, 82 N. E. 659.

The statutes on the subject are somewhat confused and conflicting, and their meaning is not altogether clear; but, after a consideration of the cases cited and an examination of the previous legislation on the subject the court is of the opinion that the provision for deciding a tie vote by the casting of lots embodied in §15, *supra*, of the act applies to all town elections. 1 R. S. 1852 p. 482; Acts 1873 p. 218, amending §§16, 17, Acts 1852, *supra*.

An examination of the act of 1852, *supra*, cited shows that the eleventh section provides for the holding of the first election of municipal officers after the incorporation of a town; §12 provides for subsequent elections of town officers to be held annually on the first



Monday of May; §13 provides the time during which the polls shall be kept open at all town elections; §14 provides for inspectors at the first election and for receiving and canvassing the votes; and §15 provides what officers shall be elected at the first election and at all subsequent elections. Section 16 of that act is as follows: "The persons having the greatest number of votes shall be declared elected as such trustees, and the persons who receive the greatest number of votes respectively for clerk, marshal, assessor, and treasurer, as designated by the ballot for such office, shall be declared so elected; and if two or more shall have an equal and highest number of votes, and there be no choice, the inspectors of such election shall forthwith determine by lot which shall be deemed elected, and it shall be the further duty of such inspectors to make a certified statement over their own signatures, of the persons elected to fill the several offices in said town, and file the same with the clerk of the circuit court, in the county thereof within ten days from the day of such election, and no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with."

When considered in connection with the other sections of the act to which reference is made, it is clear that the section quoted applied not only to the first election after the incorporation of a town, but to all subsequent elections as well. Under that act an entire new board of town trustees was elected each year; and, so long as that condition continued unchanged, this court held that the entire section, including the latter part with reference to the filing of the certificate of the inspectors with the county clerk, applied to all town elections. *Dinwiddie v. Town of Rushville* (1871), 37 Ind. 66; *Pratt v. Luther* (1873), 45 Ind. 250.

In 1881 an act was passed changing the terms for

which trustees were elected so that the terms of all of the trustees of a town could not expire at the same time. This act also provided that in case of a tie vote the inspector should determine who was elected as then provided by law, which was by casting lots. Acts 1881 p. 708, §3311 R. S. 1881. After this act was passed, the cases of *Low v. Dallas*, *supra*, and *Daly v. Gubbins*, *supra*, were decided, in which it was held that the change in the election of town trustees as made by the act of 1881, *supra*, required that the application of the latter part of the section with reference to the filing of the certificate of election be modified so as to apply to the first election held upon the incorporation of a town. The decision in those cases apply only to the latter provision of the section, and only to elections held subsequently to the taking effect of the act of 1881, *supra*. The cases of *Dinwiddie v. Town of Rushville*, *supra*, and *Pratt v. Luther*, *supra*, were not overruled or discredited. The decision in the later cases did not in any way refer to or affect the provision of the section with reference to deciding who should be deemed elected in case of a tie vote.

The statutes to which reference has been made stood without substantial change until 1905. §§4327-4333 Burns 1901. Section 16 of the act of 1852, *supra*, has been carried forward in all subsequent legislation on the subject, and was embodied without substantial change as §15 of the act of 1905 concerning municipal corporations. Acts 1905 p. 219, *supra*. While other sections of the act of 1905 have been amended, §15 is still the law.

An examination of §14 of the act of 1905, *supra*, clearly shows that it applies to all town elections, and the subsequent enactments of 1909 and 1911

2. alike indicate that they are applicable to all town elections. Acts 1909 p. 359; Acts 1911 p. 71.

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Wheeler v. State—188 Ind. 228.

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There is nothing in the history of this legislation or in the present act to indicate that the provision with reference to deciding by lot between rival candidates in case of a tie vote does not apply to all town elections.

The trial court did not err in the construction placed on the statute. Appellants' demurrer was properly overruled, and the conclusions of law announced by the court are correct. Judgment affirmed.

NOTE.—Reported in 122 N. E. 769. Mandamus against public officers, 98 Am. St. 863.

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WHEELER v. STATE OF INDIANA.

[No. 23,359. Filed April 18, 1919.]

CRIMINAL LAW.—*Appeal.—Briefs.—Sufficiency.*—Where the appellant's brief fails to make clear what error is complained of, and is in such condition that the question whether error was committed cannot be determined from it, the court on appeal will not search the record to find error, in view of the fifth clause of Rule 22.

From Marion Criminal Court (45,763); *James A. Collins*, Judge.

Prosecution by the State of Indiana against Charles Wheeler. From a judgment of conviction the defendant appeals. *Affirmed.*

*Joseph G. Graham* and *Roach & Ballard*, for appellant.

*Ele Stansbury*, Attorney-General, *Alvah J. Rucker*, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

TOWNSEND, J.—Appellant was convicted of murder in the first degree, and sentenced to life imprisonment.

Appellant's brief is in such condition that we cannot tell that any error was committed. It presents numerous motions at numerous times with reference to the jury, and indicates that evidence was heard on these

motions and examination of jurors made, and examination of jury commissioners made; but it is nowhere made clear what error appellant is complaining of. When he complains of the exclusion of evidence to sustain a motion, he does not set out the questions, the offers to prove and the rulings of the court thereon, or exception thereto, or tell where this may be found; in fact, does nothing to make his pretended points intelligible.

From what we are able to gather from the oral argument and the brief of the state, we are inclined to think that all of the errors of the court lean towards virtue's side. That is to say, that because appellant was a person of African descent, the court permitted his lawyers greater latitude in motions and objections, and contentions about different things, in the introduction of evidence thereon, than the law required him to give them. It appears that the trial court was more than fair to appellant.

The brief being in such condition that even the counsel who argued the case orally cannot understand it himself, we are at a loss to know why we should be called upon to search the record to find some error. Subdivision 5, Rule 22, is too plain to require construction.

Judgment of the trial court is affirmed.

NOTE.—Reported in 122 N. E. 769.

THE CINCINNATI, RICHMOND AND FORT WAYNE  
RAILROAD COMPANY v. THE CLEVELAND, CIN-  
CINNATI, CHICAGO AND ST. LOUIS  
RAILROAD COMPANY.

[No. 23,229. Filed April 18, 1919.]

1. **DEEDS.—Right of Way.—Evidence.—Acts and Declarations of Parties.—Construction.**—Where a deed conveying a right of way to a railroad company is silent as to the width thereof, in litigation concerning such right of way in which the width is important the contemporaneous acts and declarations of the parties to the deed, and also their subsequent acts performed before a controversy arises, are admissible to fix such width. p. 235.
2. **DEEDS.—Right of Way.—Failure to Fix Width.—Action.—Evidence.—Plat of Adjoining Tract.**—Where the same deed conveyed from the grantor to the defendant railroad company's predecessor a right of way through two adjoining tracts of land without specifying the width of such right of way, a plat of the tract adjoining the one in controversy which showed such width, and which was filed for record two years after the execution of the deed but many years before the controversy arose, was properly admitted in evidence in an action involving the width. p. 236.
3. **DEDICATION.—Public Streets.—Effect as to Land Previously Sold.**—A grantor's conveyance by quit-claim deed of a right of way across unplatted land to a railroad company that was authorized, under Local Laws 1848 p. 176, to receive land in fee for such purpose, vested a fee-simple title thereto in the company, and, though the width of such right of way was not specified, where the parties understood and intended it to be eighty feet, the grantor was without authority to dedicate such right of way as a part of a street in a subsequent plat of adjoining land. p. 237.
4. **MUNICIPAL CORPORATIONS.—Streets.—Establishment by Public User.—Railroad Right of Way.**—Where a grantor conveyed by quit-claim deed a right of way to a railroad company in fee simple, without specifying the width thereof, but the parties understood and intended the width to be eighty feet, and the company and its successor were in undisturbed possession thereof for more than forty years, using it for its tracks and for loading and unloading cars, etc., the fact that the public, as well as persons having business with the railroad company,

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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drove over a part of it does not show a use that is either exclusive or adverse so as to establish a street by public user. p. 239.

From Delaware Circuit Court; *Frank Ellis*, Judge.

Suit by the Cincinnati, Richmond and Fort Wayne Railroad Company against the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company. From a judgment for the defendant, the plaintiff appeals. *Affirmed.*

*Roscoe D. Wheat, Frank B. Jaqua and Orr & Clark*, for appellant.

*Frank L. Littleton, Charles P. Stewart and Macey, Nichols & Bales*, for appellee.

MYERS, J.—This was a suit by appellant against appellee, whereby the former sought to enjoin the latter from further entering upon its land and doing the things necessary for the permanent laying of a railroad switch track thereon; for a mandate requiring appellee to remove that part of the track in course of construction and to require it to restore the premises to its former condition.

The complaint was in one paragraph. The cause was tried by the court; special findings of fact were made, conclusion of law was stated thereon, and judgment was rendered in favor of appellee. The appellant's motion for a new trial was overruled, and this ruling is the only error assigned. The specifications relied on in support of this motion are: (1) The decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law; (3) the court erred in admitting in evidence, over objections by appellant, the plat of an extension of Mumma's addition to the city of Winchester, Indiana; and (4) error of the court in refusing to strike out this plat.

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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The questions here for decision make it unnecessary for us to set out the substance of the complaint, as the special findings furnish the basis for the controlling features in this case. Briefly stated, these findings show that on May 26, 1851, John Mumma was the owner of certain real estate adjoining the town of Winchester as originally laid out, and on that day conveyed by deed to the Indianapolis and Bellefontaine Railroad Company the right of way for a railroad east and west over the same. On June 9, 1851, Mumma platted a certain portion of this real estate as an addition to the town of Winchester. The ground thus platted abutted both sides of the right of way so deeded to the railroad company. On this plat the blocks, lots and streets are shown. The width and names of the streets are given, and the size of the lots are designated in figures. Block No. 3 is described as being 169 feet east and west and eighty feet north and south, and is in possession of appellant as owner through successive conveyances from Mumma. This block abuts Meridian street on the east, Pearl street on the south, an alley on the west, and so-called Railroad avenue on the north. As shown on the plat, Meridian street is eighty-two feet wide, Pearl street is sixty-six feet wide, the alley twelve feet wide and Railroad avenue 110 feet wide, and embraces the tract of the Indianapolis and Bellefontaine Railroad. On this plat block No. 3, and others east and west of it, are designated as Commercial Row. On October 18, 1853, Mumma made an additional plat which included real estate belonging to him adjoining both sides of the right of way of the Indianapolis and Bellefontaine Railroad Company, and immediately to the east and adjoining the real estate which he had platted on June 9, 1851. This plat was filed and recorded and is known as "Mumma's Extension." The right of way of the Indianapolis and Bellefontaine Railroad Company ex-

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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tends from the west to the east across the said extension, and is continuous with that portion of the right of way of the said railroad which crosses the plat of 1851; and the south line of said right of way, as shown on the plat of 1853, is a continuous line with the south line of the right of way as it appears on the plat of 1851. That the said right of way as it appears on the plat known as Mumma's Extension is eighty feet in width; that in the years 1851-52, Mumma's grantee of said right of way entered upon the same and constructed thereon a main track, and to the south thereof a sidetrack; that these tracks were constructed over the south eighty feet of Railroad avenue; that thereafter appellee became the successor and owner of all the rights, property and privileges of the Indianapolis and Bellefontaine Railroad Company, situate and shown on said plat as Railroad avenue and immediately north of block No. 3; that since the construction of said main track and sidetrack, appellee and its predecessor have been continuously in possession of the eighty feet of ground north of the south line of Railroad avenue and abutting block No. 3, and during all of that time they have continuously occupied and used the same; that for more than thirty years appellee has used the space between its tracks and block No. 3 for a coalhouse, toolshed, and as a place for the storage of materials for use in the repair and construction of its railroad, as also by its customers and shippers for the purpose of loading and unloading cars; that in the year 1885 appellee constructed on the passageway between its sidetrack and block No. 3, and near the northwest corner of block No. 3, a telegraph and interlocking tower which obstructed and closed this way for the use by teams; that no part of the south eighty feet of Railroad avenue throughout its entire length was ever in any manner improved by the public, or by the town or city officials of Winchester; that



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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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the rails of the tracks so constructed as aforesaid within Railroad avenue projected above the grade on which they were laid, rendering it unsafe and inconvenient to drive over with teams; that in the year 1906 the city of Winchester improved the north thirty feet of Railroad avenue, from the east side of Meridian street to the west side of Main street, with a brick pavement for which appellee's right of way was assessed benefits, which it paid. Main street is the first street east of Meridian street and intersects Railroad avenue. For more than forty years prior to the bringing of this suit appellee maintained upon the south side of Railroad avenue and to the east of Meridian street a third track known as the "Commercial" or "Stub" track, which extended from the east end of Railroad avenue to the east side of Meridian street, and was continuously used by appellee as a loading and unloading track, especially for the purpose of loading and unloading from and into the buildings located on the south side of, and abutting upon, said Railroad avenue, which buildings were owned and used by divers persons and corporations; that some of these buildings were owned by appellant and occupied by its tenants; that this use of the third track was without objection on the part of appellant; that in May, 1914, appellee extended said third track to the west across Meridian street and south of the sidetrack to a point near the telegraph and interlocking tower, and over the ground theretofore continuously used by it and its customers; that appellee and its predecessor, since May 26, 1851, has been in open, notorious, exclusive, uninterrupted and adverse possession under color of title of the south eighty feet of Railroad avenue as laid out on the plat, and especially that part located to the west of Meridian street north of block No. 3, which is the real estate in controversy; that appellee at the time of bringing this suit was not, nor since that time has it en-

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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gaged in, digging up the soil or engaged in laying a switch track, nor has it laid any switch track upon block No. 3, the property of appellant. Upon these findings the court concluded that the law was with appellee; that the temporary restraining order should be dissolved.

We will consider the questions presented in their reverse order, and, in doing so, our attention will first be directed to the ruling of the court in admitting in evidence a certified copy of the plat of John Mumma's extension to Mumma's addition to Winchester.

It appears that the plat in question was acknowledged and filed for record by Mumma in the recorder's office of Randolph county on October 18, 1853, as

1. an extension, to the east, of his former addition.

It shows a strip of land eighty feet wide running east and west across the land so platted on which appears the name "Indianapolis & Bellefontaine Railroad Company." The south line of this strip, if extended west, would be the south line of Railroad avenue in the original plat, and the north line, if extended west, would be thirty feet south of the north line of Railroad avenue. Nothing is said in the deed from Mumma to the Indianapolis and Bellefontaine Railroad Company as to the width of the right of way so conveyed. In a case like this, where the width of a right of way may be of some importance or is questioned, and the instrument or deed thereto does not fix the width, the contemporaneous declarations and acts of the parties with reference to the same, as also subsequent acts if performed before a controversy arises, are admissible to fix such width. *Indianapolis, etc., R. Co. v. Lewis* (1889), 119 Ind. 218, 21 N. E. 660; *Indianapolis, etc., R. Co. v. Reynolds* (1888), 116 Ind. 356, 19 N. E. 141; 2 Elliott, Contracts §1538. Such declarations or acts are admitted on the theory that they tend to show how the parties under-

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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stood the contract and may furnish a practical construction of it. 2 Elliott, Contracts §1538.

While the plat in question did not include the particular strip of land in controversy, yet the same deed gave the right of way over the land covered by

2. both plats. Under the circumstances shown by this record, the making and recording of the last plat by Mumma, fixing the location and width of the "right of way," must be regarded as indicating to his grantee the width of the strip thus conveyed, not only over that particular tract, but over the land adjoining it on the west. The plat was properly admitted. *Rodgers v. Pittsburgh, etc., R. Co.* (1917), 255 Pa. St. 462, 100 Atl. 271; *Fraley v. Fraley* (1909), 150 N. C. 501, 506, 64 N. E. 381; *Powers v. World's Fair Mining Co.* (1906), 10 Ariz. 5, 86 Pac. 15.

As we see this case, the controlling question is whether or not block No. 3 owned by appellant abuts on the south the right of way of appellee, or a public street known as Railroad avenue. If Railroad avenue for its entire width of 110 feet is a public street, and appellant is the owner of the servient estate to the center thereof, as it claims, then the judgment from which it appeals must be reversed, but, if appellee is the owner in fee simple of the south eighty feet and abutting block No. 3, as claimed by it, then the judgment must be affirmed.

The special findings of the trial court support the contention of appellee, but appellant insists that the evidence does not support the findings, and that the decision of the trial court is contrary to law. Appellant first makes the point that appellee by its proposed use of the street is taking appellant's property without due process of law in violation of the fifth and fourteenth amendments to the federal Constitution, and, second, that the proposed use will destroy one of its means of ingress and egress to its property without

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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just compensation first assessed and tendered, in violation of §21, Art. 1, of the Constitution of Indiana. Our conclusion on other questions here presented renders a discussion of these constitutional provisions unnecessary.

It is conceded that both parties to this appeal derived title to their respective parcels of land from a common source. John Mumma, being the original owner of all this land, on May 26, 1851, by quitclaim deed released to appellee's predecessor "the right of way" for a railroad over the northeast quarter of section No. 20, township No. 20, north, range No. 14, not included in the original plat of the town of Winchester, nor in a four-acre lot owned by one Smith. Shortly thereafter Mumma's grantee, the Indianapolis and Bellefontaine Railroad Company, constructed a railroad over this land, and along the line on which appellee's tracks are now located.

The Bellefontaine company was incorporated under an act of the general assembly of this state, approved February 17, 1848. Local Laws 1848 p. 176. Section 16 of this act authorizes the construction of the railroad; §18 authorizes it to receive from persons land necessary for the construction or location of its road; and §21 provided that: "When said company shall have procured the right of way as hereinbefore provided, it shall be seized in fee simple of the right to said land, and shall have the sole use and occupation of the same."

The trial court found, and the evidence supports the finding, that while Mumma owned the unplatted land he quit-claimed a railroad right of way across

3. the same to a company authorized by law to accept land for that purpose. The executed deed had the effect to vest the fee-simple title in the company. Laws 1848, *supra*. The findings supported by evidence also show that the first plat was not made until

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Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.—188 Ind. 230.

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after the execution of the deed from Mumma to the railroad company. Under this state of facts, it is quite clear that Mumma was not the owner of all the land covered by the plat at the time it was filed, and any attempt by him to dedicate to the public any other than his own was without authority and ineffective for any purpose. *Earll v. Chicago* (1891), 136 Ill. 277, 26 N. E. 370; *Hague v. Inhabitants, etc.* (1873), 23 N. J. Eq. 354; *Bruce v. Seaboard, etc., Railway Corp.* (1906), 52 Fla. 461, 467, 41 South. 883; *State, ex rel. v. Morgan's, etc., Steamship Co.* (1903), 111 La. 120, 35 South. 482; *City of Detroit v. Detroit, etc., R. Co.* (1871), 23 Mich. 173; *McShane v. City of Moberly* (1883), 79 Mo. 41; *Ward v. David* (1850), 3 Sandf. (N. Y. Super.) 502.

We have no fault to find with appellant's contention that the owner of a tract of land is held to dedicate such portion thereof as is designated for public use on a recorded plat with reference to which he sells lots. *Miller v. City of Indianapolis* (1890), 123 Ind. 196, 24 N. E. 228. But the facts before us make an entirely different case, for here it appears from the evidence and the findings that the north thirty feet only of Railroad avenue Mumma was authorized to dedicate to the public, and that the eighty feet opposite and abutting on the north line of block No. 3 was for more than forty years in the undisturbed possession of appellee and its predecessor; that this same eighty feet was taken possession of by the Indianapolis and Bellefontaine Railroad Company in the year 1851, and it, and its successor, have continuously used this strip of ground from that time until the present as a private right of way. Under the evidence in this cause and the provisions of the act of February 17, 1848, it seems clear that the release executed by Mumma to appellee's predecessor must be construed as giving to appellee the fee-simple title to the south eighty feet of Railroad avenue.

The further contention of appellant that a highway over the strip of ground in question has been established by public user is not supported by the findings or

4. evidence. The fact that the public, as well as persons having business with the railroad company, drove over that part of the right of way which was used for the purpose of loading and unloading cars does not show a use that is either exclusive or adverse. *Baltimore, etc., R. Co. v. City of Seymour* (1899), 154 Ind. 17, 55 N. E. 953, and authorities cited; *Cannon v. Cleveland, etc., R. Co.* (1901), 157 Ind. 682, 62 N. E. 8.

Upon a careful review of the evidence, we hold that it supports the findings, and that the findings justify the conclusions of law. There was no error in overruling appellant's motion for a new trial. The judgment is affirmed.

NOTE.—Reported in 123 N. E. 1. Railroads: estate or interest acquired in land purchased for right of way, Ann. Cas. 242, 13 Ann. Cas. 432, Ann. Cas. 1916E 763, 33 Cyc 168. See under (1, 2) 18 C. J. 282; (4) 28 Cyc 835.

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### PIERSON v. STATE OF INDIANA.

[No. 23,450. Filed April 22, 1919.]

1. WITNESSES.—*Accused as Witness.*—*Cross-Examination.*—*Credibility.*—Though a defendant in a criminal prosecution testifying in his own behalf may be cross-examined as to a prior conviction for the purpose of affecting his credibility as a witness, it was error for the court to instruct the jury that impeaching testimony brought out in such cross-examination should be considered in determining the defendant's guilt or innocence. pp. 243, 245.
2. WITNESSES.—*Credibility.*—*Cross-Examination.*—*Extent.*—Any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be shown in cross-examination, but the extent to which such cross-examination may be carried is within the sound discretion of the court. p. 245.

3. **CRIMINAL LAW.—Witnesses.—Instructions.—Character.—Character of Codefendants.**—In the prosecution of a defendant for conspiracy, an instruction that evidence concerning an offense of a codefendant should be considered by the jury in determining the guilt or innocence of the defendant, if it in any way applied to the conduct of the defendant, was erroneous. p. 245.
4. **CRIMINAL LAW.—Instructions.—Prejudicial Error.—Character.**—Where the evidence is wholly circumstantial and contradictory, instructions permitting the jury to consider the defendant's character and prior convictions in determining his guilt were prejudicial. p. 246.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Prosecution by the State of Indiana against Enoch Pierson. From a judgment of conviction, the defendant appeals. *Reversed.*

*H. J. Paulus, George H. Ward, John Burns, Joseph Burns and Harry E. Roberts*, for appellant.

*Ele Stansbury, Newman T. Miller and Dale F. Stansbury*, for the state.

**WILLOUGHBY, J.**—This is an appeal from a judgment of conviction upon an affidavit charging appellant, together with three others, with the crime of conspiracy to commit arson. Appellant upon his own motion was granted a separate trial from his codefendants, and the cause was submitted to a jury for trial on the issue formed by the plea of not guilty to the charge in the affidavit. The only error assigned is that the court erred in overruling appellant's motion for a new trial. In appellant's motion for a new trial he insists that the court erred in giving, over objection of appellant, certain instructions of its own motion.

The court of its own motion gave the following instruction, No. 20, over the objection of appellant: "The good character of the accused, when satisfactorily established by competent evidence, is an ingredient

which ought always to be considered by the jury, together with the other facts and circumstances in the case, in determining his guilt or innocence. You are therefore instructed that the evidence of good character of the defendant in this cause and the evidence of his bad character, if any is shown, is competent to be taken into consideration by you in determining his guilt or innocence. The good character of the accused, when satisfactorily established, may, of itself, create such reasonable doubt in the minds of the jury as would justify an acquittal, unless the facts and circumstances point so unerringly to his guilt that, notwithstanding his good character, the jury can say, beyond a reasonable doubt, that he is guilty."

And in instruction No. 26, given by the court of its own motion over appellant's objection, the court said: "The court also instructs you that evidence has been permitted to be introduced touching upon the bad moral character of the defendant in the community in which he lived. This evidence is competent upon behalf of the state, and if the jury believe from the evidence that prior to the time it is alleged that the crime was committed the defendant bore a bad reputation in the community in which he lived for morality, then this is a fact proper to be considered by you, together with all the other facts proven in the case, in determining the guilt or innocence of the defendant, and after a careful consideration of all the evidence in this case, including that pertaining to his previous good character, if such evidence has been introduced, as well as the evidence with reference to his previous bad character, if such evidence has been introduced, the jury entertain any reasonable doubt of the defendant's guilt he cannot be convicted. And, also, if you find from the evidence that on and prior to the 10th day of July, 1916, either of the co-



defendants, Frederick Drake, Elisha Roberts or Calvin Lincoln were persons who bore a bad reputation for honesty and integrity, or for morality, this fact or these facts, if such facts appear in the evidence, should be considered by you, along with all the other evidence in the cause in determining the guilt or innocence of the defendant, Pierson, but you will not consider any specific offense alleged to have been committed by either one of the other defendants as in any way applying to the conduct of this defendant, except in so far as it applies, if it does apply, to the character of the defendant on trial."

Instruction No. 27, given by the court of its own motion over objection of appellant, is as follows: "Evidence has been permitted to go to you concerning the whole period of the defendant's life, up to the alleged commission of the alleged offense. This evidence has been proper and must be considered by you, in weighing the testimony on the question of the defendant's guilt or innocence. It was permitted for the purpose of showing what manner of man the defendant has been during all this period, that you might consider the question of whether or not such a man would be guilty of such an offense as charged in the affidavit, and also that you might consider his own testimony, and the truthfulness of the same, and in determining his guilt or innocence you will at all times have in your mind what manner of man this defendant has been shown to be by the evidence touching on that question. It will be also your duty to consider the evidence, if there is any evidence on that subject, tending to show the reputation of the defendant on trial for morality in that community."

Appellant claims that each of said instructions Nos. 20, 26 and 27 is erroneous and harmful to appellant for the reasons: (1) That instruction No. 20 charged the

jury that it was competent for them to take into consideration evidence of the defendant's bad character in determining his guilt or innocence when the law requires that the evidence of bad character of the defendant could only be considered as to his credibility as a witness and not as to his guilt, and the evidence of the general moral character of defendant is admissible only as going to his credibility as a witness and not as to whether he did, or did not, commit the crime with which he is charged. *Keyes v. State* (1890), 122 Ind. 527, 23 N. E. 1097. (2) That instruction No. 26 told the jury that, if the defendant bore a bad reputation in the community in which he lived for morality, then that fact was proper to be considered by the jury in determining the guilt or innocence of defendant Pierson; that it instructed the jury that it could consider any specific offense committed by defendant Pierson as going to his guilt. There was some evidence that Frederick Drake, one of the codefendants, not upon trial, had been arrested for selling liquor in violation of law, and the court, in this instruction, tells the jury that if specific offenses committed by the other defendants in any way apply to this defendant, then the jury could consider such evidence as to the character of defendant Pierson. (3) That instruction No. 27 told the jury that evidence of the bad moral character of the defendant, and evidence that he had pleaded guilty to associating with a prostitute and had been fined \$10, and given a jail sentence, must be considered by the jury in weighing the testimony on the question of the defendant's guilt or innocence.

The defendant testified in his own behalf. He was cross-examined by the prosecuting attorney at considerable length, and, among others, the prosecuting

1. attorney put the following question: "I want to ask you whether or not on September 18, 1914,

you were not arrested and taken into the city court of Marion, Indiana, to which you plead guilty to a charge of fornication, under the assumed name of Ed Pierce, and for which crime you were fined \$10, and given a sentence of thirty days in jail, which thirty days in jail was suspended by the mayor of Marion, acting as judge of the city court?"

The defendant objected to this question on the grounds that the defendant's moral character had not been put in issue, that only his character for honesty and integrity had been put in issue, and further that it is not proper to go to specific acts to attack reputation, but the court overruled the objections, and required the defendant to answer. He then answered, "I was—the date is wrong, that is all."

This evidence was brought out in cross-examination by the state, and under the rule laid down in *Vancleave v. State* (1897), 150 Ind. 273, 49 N. E. 1060, it was not error for the court to require the defendant to answer this question upon cross-examination, when the court informed the jury that such evidence could only be considered by the jury as affecting the credibility of the defendant's testimony. The defendant in becoming a witness subjected himself to the same treatment as any other witness, but that did not authorize the court to instruct the jury that such impeaching questions should be considered by the jury in determining the guilt or innocence of defendant in the case on trial. The impeachment of a witness for moral character only goes to the weight of his evidence and not to prove any issue in criminal cases. In *Vancleave v. State*, *supra*, it is held that a person on trial for larceny, who becomes a witness in his own behalf, may be asked on cross-examination whether he had not previously been convicted of a similar crime, for the purpose of showing his credibility as a witness. In that case the appellant, while on

the witness stand as a witness on his own behalf, was asked on cross-examination, the following question: "I will ask you if you were arrested on the charge of larceny, and convicted in this court at the March term, 1886?" Answer: "Yes I was." Question: "I will ask you if you are not now under indictment and arrest for robbing Charles Keith?" Answer: "Yes sir." The court held these questions to be proper and that there was no error in permitting such cross-examination. The court, however, told the jury that it was admitted only for one purpose, and its consideration by them must be confined to that purpose, and that that purpose was to affect the credibility of appellant's testimony. *Parker v. State* (1894), 136 Ind. 284, 35 N. E. 1105; *Bessette v. State* (1885), 101 Ind. 85; *Blough v. Parry* (1896), 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Shears v. State* (1896), 147 Ind. 51, 46 N. E. 331.

It has been held that any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in

2. character, may be shown in cross-examination, but the extent to which such cross-examination may be carried is within the sound discretion of the court. *City of South Bend v. Hardy* (1884), 98 Ind. 577, 49 Am. Rep. 792; *Parker v. State*, *supra*; *Spencer v. Robbins* (1886), 106 Ind. 580, 5 N. E. 726.

In this case the court did not give any instruction limiting the evidence given by the defendant on cross-examination to the effect that said defendant had

1. been fined and given a jail sentence on plea of guilty in the Marion City Court on a charge of fornication, to the question of defendant's credibility as a witness. But by instruction No. 20 the jury are told that it should be taken into consideration by them in determining the guilt or innocence of the defendant. The same direction is also given in

instruction No. 26. And in instruction No. 26 the court goes still further by saying: "You will not consider any specific offense alleged to have been committed by either of the other defendants as in any way applying to the conduct of this defendant, except in so far as it applies, if it does apply, to the character of the defendant on trial." This instruction indicated to the jury that they should consider any specific offense alleged to have been committed by the defendant, and the court inferentially told them to take into consideration the Marion City Court incident, brought out in cross-examination of this appellant, and it also told them that the evidence concerning the arrest of Frederick Drake on a charge of selling liquor in violaion of law should be considered by them in determining the guilt or innocence of the defendant, if it in any way applied to this defendant.

In instruction No. 27 the jury were told that they must consider the evidence, which had been permitted to go to them, concerning the whole period of defendant's life up to the commission of the alleged offense, in weighing the testimony on the question of the defendant's guilt or innocence. The instruction closes by saying: "It will be also your duty to consider the evidence, if there is any evidence on that subject, tending to show the reputation of the defendant on trial for morality."

The evidence in this case is wholly circumstantial. It is contradictory, and under such circumstances it cannot be said that the instructions complained

4. of by appellant were not harmful to him. Our conclusion is that under the evidence instructions Nos. 20, 26 and 27, were erroneous and harmful to appellant. Other alleged errors are discussed in appellant's brief, but as they will not probably occur on a retrial of this cause, it is not necessary to extend this opinion by a discussion of them.

For error in giving instructions Nos. 20, 26 and 27

this judgment is reversed, and the Randolph Circuit Court is instructed to sustain appellant's motion for a new trial.

NOTE.—Reported in 123 N. E. 118. See under (1) 40 Cyc 2510, 2622; (2) 40 Cyc 2564, 2615, 2626, 2662; (3) 16 C. J. 580, 586; (4) 17 C. J. 340.

### WRIGHT ET AL. v. HOUSE.

[No. 23,476. Filed January 10, 1919. Rehearing denied April 22, 1919.]

1. CONSTITUTIONAL LAW.—*Eminent Domain.—Due Process.—Compensation.*—The fifth amendment to the federal Constitution applies only to the federal government; hence, a state statute cannot be held invalid on the ground that it conflicts with such amendment. p. 252.
2. CONSTITUTIONAL LAW.—*Due Process.—State Statute.*—A state law that would have the effect by its enforcement of depriving a citizen of his property without due process of law would be void as violative of the fourteenth amendment of the federal Constitution, since such amendment is prohibitive on the several states in respect to the rights of citizens therein guaranteed. p. 252.
3. TAXATION.—*Levy.—Notice and Hearing.—When Necessary.*—The rule that, where a local public improvement is constructed under a law providing that the cost, or a part thereof, shall be levied on specific property benefited, the owners of such property are entitled to notice and an opportunity to be heard, has no application to the exercise of the general taxing power of the state or of any of its municipal subdivisions. p. 253.
4. TAXATION.—*General Taxes.—Amount.*—Since the benefits resulting from organized government cannot be measured in money, taxes levied for governmental purposes are not imposed on the basis of actual benefits resulting to each citizen in proportion to the taxes paid, and the power to tax for such purpose is limited only by governmental needs. p. 254.
5. TAXATION.—*Purpose.—Public Improvements.*—Where the legislature authorizes public improvements that are of such general benefit as to warrant the construction thereof by the state, or by any of its governmental subdivisions, it has power to determine the manner in which the fund shall be raised for the payment of the cost and expenses. p. 254.

6. **TAXATION.—Public Improvements.—General Tax.—Special Assessments.—Legislative Power.**—If the legislature decides that a public improvement is of such general benefit as to justify such a course, it may provide that the entire cost shall be raised by a general tax; or, in case it decides that such improvement is not of sufficient public importance to justify the payment of the entire cost by a general tax, it may provide that special assessments shall be made against property beneficially affected and that the remainder be paid by the municipality within which the improvement is located from funds raised by general taxation; or, if the total costs do not exceed the aggregate special benefits to the property so affected, the legislature may provide that the entire costs shall be specially assessed against such property. p. 254.
7. **TAXATION.—Legislative Power.—Public Improvements.**—The power to determine in what manner the cost of a public improvement shall be raised is legislative in character, and the action of the legislature in that regard is binding on the other departments of government. p. 255.
8. **TAXATION.—General Tax.—Special Assessments.—Liability.**—A “general tax,” under §10344 Burns 1914, Acts 1903 p. 49, creates a personal liability of the taxpayer, and constitutes a general lien on real and personal property of the taxpayer situated in the county; while a “special assessment” creates a particular lien on the property assessed, on the theory that such property has been beneficially affected, and such lien, not being personal, cannot be enforced against any other property. pp. 255, 256.
9. **HIGHWAYS.—Improvement.—Constitutional Law.—Due Process.—“Due Course of Law.”—General Tax.**—Since the funds provided for under the State Highway Act (Acts 1917 p. 253) for the improvement of highways arise from an exercise of the general taxing power, and not from special assessments, the question of actual benefits to property affected is not involved and property owners are not entitled to a notice and hearing on that question, “due process” under the fourteenth amendment to the federal Constitution, or “due course of law” under Art. 1, §12, of the state Constitution, requiring only such procedure as is suited and adapted to the levy and collection of general taxes. pp. 256, 257.
10. **HIGHWAYS.—Power to Construct.—Nature of Function.—General Tax.—Legislative Power.**—Since the power to construct and maintain public highways, like the power to construct and maintain the state institutions, is a governmental function, the legislature may provide for their establishment and maintenance by a general tax, or empower any of the

governmental subdivisions of the state to levy and collect taxes for that purpose in the exercise of delegated governmental powers. p. 257.

11. CONSTITUTIONAL LAW.—*Judicial Power.*—*Legislative Power.*—*Taxation.*—If the exercise of the taxing power in any instance is regarded by the people as unwise, unjust or oppressive, the remedy must be sought through legislative action, the judicial department being powerless to grant relief on such grounds. p. 257.
12. EMINENT DOMAIN.—*General Taxation.*—*Highways.*—*Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) does not conflict with Art. 1, §12, of the state Constitution, which provides that no man's property shall be taken by law without just compensation, such prohibition not extending to the general taxing power of the state. p. 258.
13. TAXATION.—*Uniform Taxation.*—*Highways.*—*Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) does not conflict with Art. 10, §1, of the state Constitution, which provides for a uniform and equal rate of taxation and assessment, although one county, by reason of greater improvements, may pay a larger tax rate than another, since each county is a separate unit for the purpose of taxation. p. 258.
14. STATUTES.—*Title.*—*Subject.*—*Constitutional Law.*—Where the general subject of an act is expressed in the title, it is not necessary that matters properly connected therewith shall be also expressed in the title. p. 258.
15. STATUTES.—*Title.*—*Subject.*—*Highways.*—The selection of roads to be improved under the State Highway Act (Acts 1917 p. 253), and the appropriation of money and the levy of taxes to raise funds to pay for such improvements, are properly connected with the subject of the act as expressed in the title "An act creating a highway commission, providing for the construction, reconstruction, maintenance, repair and control of public highways," etc. p. 259.
16. STATUTES.—*"Local or Special Law."*—*Highways.*—*Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) is in no sense a local or a special law so as to bring it within the inhibition of Art. 4, §22, of the state Constitution. p. 259.
17. CONSTITUTIONAL LAW.—*Validity of Act.*—*Appeal.*—*Objection.*—The objection that an act invades "the reserved power of the people" is indefinite, and unless the provision of the Constitution containing such reservation is pointed out, the Supreme Court will assume that the term is used with reference to some supposed governmental power that the people impliedly reserved unto themselves when the Constitution was adopted. p. 259.



18. CONSTITUTIONAL LAW.—*Legislative Power.—State Constitution.—Construction.*—The state Constitution carries a general grant of legislative power under which the legislature may enact any law on any subject, unless the power is limited or denied by other express provisions; the cases of *Ellingham v. Dye* (1912), 178 Ind. 336, and *Bennett v. Jackson* (1917), 186 Ind. 533, which seem to recognize a residue of power abiding in the people, must be confined in their scope to legislation that would deny, limit or impair the inherent and inalienable right of the people to alter their government by the adoption of a new constitution. pp. 259, 260, 261.
19. CONSTITUTIONAL LAW.—*Legislative Power.—Federal Constitution.—Construction.*—The federal Constitution confers on Congress certain legislative power, and all such power not thus conferred is reserved to the several states. p. 260.
20. HIGHWAYS.—*Highway Commission.—Nature.*—By the creation of a state highway commission, the State Highway Act (Acts 1917 p. 253) does not establish a new department of government, the commission being an administrative body intrusted with the application and administration of the act under which it is appointed. p. 262.
21. CONSTITUTIONAL LAW.—*State Highway Commission.—Judicial Power.*—The State Highway Act (Acts 1917 p. 253), which creates a highway commission, is not open to the objection that it confers powers of a judicial nature upon a body that is administrative in its character. p. 262.

From the Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Robert M. House against Lorenzo H. Wright and others to enjoin the improvement of a highway. From a judgment for the plaintiff, the defendants appeal. *Reversed.*

*Ele Stansbury*, Attorney-General, and *John H. Edwards*, for appellant.

*Christian, Christian & Waltz* and *William V. Rooker*, for appellee.

LAIRY, J.—At the 1917 session of the legislature of the State of Indiana a law was passed entitled "An Act creating a highway commission, providing for the construction, reconstruction, maintenance, repair and control of public highways, and providing for co-opera-

tion with the federal government in the construction of rural post roads," approved March 8, 1917. Acts 1917 p. 253. In accordance with the provisions of this act the Governor of the state appointed Lorenzo H. Wright, David C. Jenkines, Haines Egbert and Lewis Taylor as members of the state highway commission. This commission, in accordance with the provisions of §9 of the act, designated certain roads of the state as main market highways, which designation was approved by the Governor. One of the highways so designated extends through the county of Hamilton in said state, twenty miles of which road is within the limits of said county. December 4, 1917, the board of commissioners of Hamilton county made an order directing that a portion of main market highway No. 1, as designated by the state highway commission, beginning at the south boundary line of Hamilton county and extending north a distance of approximately five miles to the town of Carmel, be improved as a main market highway, according to plans, specifications and estimates to be furnished by the state highway engineer, and in accordance with the provision of the act heretofore cited. After entering the order the board of commissioners made a written application to the state highway commission for state aid in the construction of said work, agreeing therein that the county of Hamilton would pay fifty per cent. of the total cost of said improvement, and reciting therein that the money to meet the county's part of the expense would be available upon the completion and acceptance of the work as provided by §18 of the act, *supra*, and that the money would be raised by the issue of the bonds of Hamilton county, as provided by §28 of the act, *supra*, under consideration.

This action was brought by appellee, as a property owner and taxpayer of Hamilton county, against the members of the state highway commission and the mem-

bers of the board of commissioners of Hamilton county and the other state and county officials who are charged with duties in carrying out the provisions of the act, the purpose of the action being to enjoin the defendants, and each of them, from taking further action under said statute on the ground that it was void because in conflict with certain provisions of the federal Constitution, and also certain provisions of the Constitution of this state. Appellee prevailed in the trial court and appellants seek by this appeal to reverse the decision of that court.

Appellee asserts that the act in question violates the federal Constitution in two particulars: First, that in its operation it would have the effect of depriving him and others in like situation of property without due process of law in violation of the fourteenth amendment; and, second, that its operation would result in the taking of his property, and the property of others in like situation, for a public use without just compensation, in violation of the fifth amendment.

The Supreme Court of the United States has decided that the fifth amendment to the federal Constitution applies only to the federal government. It fol-

1. lows that it does not apply to the government of the several states, and that a state statute cannot therefore be held invalid because it may conflict with the provisions of this amendment. *Fallbrook Irrigation District v. Bradley* (1896), 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. Our state Constitution contains a similar provision which will be considered later in this opinion.

On the other hand, the fourteenth amendment is prohibitive on the several states in respect to the rights of citizens thereby guaranteed. A state law, there-

2. fore, which would have the effect by its enforcement of depriving a citizen of his property with-

out due process of law would be void as violative of this amendment.

In opposition to the validity of the act under consideration, it is asserted that the provisions made therein for raising the money with which to pay for the improvement, if enforced, will result in depriving appellee, and others in like situation, of property without affording them due process of law.

This assertion is based on the assumption that, by due process of law, appellee is entitled to have the amount, which he shall be required to pay for the pro-

3. posed improvement, determined and fixed by a court or some other regularly constituted tribunal after a notice and an opportunity to be heard. This court has recently held that, where a local improvement of a public nature is constructed under a law providing that the costs shall be paid in whole or in part from the proceeds of special assessments to be levied on the property beneficially affected thereby, the property owners have a right to notice and an opportunity to be heard before a special assessment of this kind can be legally imposed. *Harmon v. Bolley* (1918), 187 Ind. 511, 120 N. E. 33. The reason for the rule there announced is that such assessments are made on the theory that each particular piece of property assessed is specially affected and benefited to an extent at least equal to the amount of the assessment imposed. Such assessments are imposed on the theory that the property affected is enhanced in value or otherwise specially benefited to the full amount of the assessments imposed, and that nothing is exacted by the assessment which is not fully compensated by benefits actually accruing to the land affected. *Norwood v. Baker* (1898), 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. The rule thus announced applies only to special assessments made against specific property based on actual benefits resulting thereto

on account of a local improvement. The rule has no application to the exercise of the general taxing power of a state or of any of its municipal subdivisions.

Taxes levied for governmental purposes are not imposed on the basis of a special and particular benefit accruing to each citizen in proportion to the

4. taxes paid. The protection of life, liberty, and property, and the other rights, privileges, immunities and benefits which a citizen enjoys as a result of living under the protection of an organized government are of such a nature that their value cannot be measured by dollars and cents. The power to tax for such purpose is not limited to actual benefits resulting to the citizen by reason of the maintenance of government, but such power is limited only by governmental needs. *Harmon v. Bolley, supra; Kelly v. Pittsburgh* (1881), 104 U. S. 78, 26 L. Ed. 658.

There can be no doubt that improvements of a public nature such as the construction and improvement of highways, waterways, bridges, and other works

5. of a like nature, may be of such general benefit as to warrant their construction at government expense in the exercise of governmental power.

6. Where the legislature authorizes an improvement of the character mentioned to be made by the state, or by any of its governmental subdivisions, it has power to determine the manner in which the fund shall be raised for the payment of the costs and expenses. If it decides that the improvement is of such general benefit and public importance as to justify such a course, it may provide that the entire fund shall be raised by a general tax. In case the work contemplated is not regarded by the law-making power as of sufficient public importance to justify the payment of the entire cost by general taxation, it may provide that property beneficially affected by the improvement shall bear a portion

of the cost to be specially assessed against it in proportion to the accruing benefits, and that the remainder of the cost shall be paid by the municipality within which the improvement is located from funds raised by general taxation; or the legislature may provide that the entire cost and expense of the improvement shall be specially assessed against the property beneficially affected in case the total costs and expenses do not exceed the aggregate special benefits accruing to the property so affected. 1 Page and Jones, *Taxation by Assessment* §239; *Lowe v. Board, etc.* (1900), 156 Ind. 163, 59 N. E. 466; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 595, 85 N. E. 513; *City of Indianapolis v. American, etc., Co.* (1911), 176 Ind. 510, 96 N. E. 608. The

power to determine in which of these ways such

7. a fund shall be raised is legislative in character, and the action of the legislature in that regard is binding on the other departments of government.

In framing the statute under consideration the legislature provided that the entire cost of the contemplated construction and improvement of highways

8. should be paid from funds raised by the exercise of the general taxing power, and no provision is made for the payment of any part of such cost by special assessments against property on the theory that it will receive benefits to the extent of the assessment imposed. The act provides that where a part of a main market highway lying within the limits of a county is improved under the provisions of the act, the costs of such improvement shall be paid, one-half by the state and one-half by the county within which the improvement is located, except as to portions of such improvement located within the limits of a city or incorporated town. As to the cost of such portion, the act provides that the city or town, the county, and the state shall each pay an equal part. Acts 1917 p. 253, §§14 and 15.

Section 27 of the act, *supra*, provides for a state highway fund, a part of which is derived from moneys to be paid to the state treasurer under the operation of §15 and §26 of the act, and the remainder is raised by the exercise of the general taxing power of the state. Under §28 of the act, a county in which an improvement has been made under the provisions of this act may provide a fund to pay its portion of such improvement, either by the appropriation of county funds on hand, or by the issue of county bonds or the levy of a special highway tax in accordance with statutes relating to the issue of county bonds and the levy of special highway taxes. Irrespective of which of these methods the county may adopt, it is clear that the entire amount which the county contributes to the costs of an improvement constructed therein is derived from the proceeds of a general tax levied on all property subject to taxation by the county. A general tax creates a personal liability of the taxpayer, and constitutes a general lien on real and personal property of the taxpayer

8. situated in the county. §10344 Burns 1914, Acts 1903 p. 49. A special assessment is imposed on particular property, generally some definite tract or parcel of real estate. It constitutes a particular lien on the property assessed on the theory that such property is benefited by the improvement to the extent of the assessment. Such an assessment does not create a personal liability against the owner, and it cannot be enforced against any of his property other than that against which it is made. The funds to be raised under the provisions of the act in question to pay for the improvement of highways are not the proceeds of special assessments, but, on the contrary, arise from an exercise of the general taxing power. The question of actual benefits to property affected is not involved, and appellee is not entitled to a

notice and hearing on that question. Due process of law requires only that the tax shall be levied and collected by such a procedure as is suited and adapted to the levy and collection of general taxes and such as is generally resorted to for that purpose. *Lake Shore, etc., R. Co. v. Smith* (1892), 131 Ind. 512, 521, 31 N. E. 196.

The power to construct and maintain public highways is a governmental function, the same as the power

to build schoolhouses and support schools or to

10. build courthouses and jails, or to construct and maintain asylums for the insane or for the dependent poor. The legislature may provide for

11. the establishment and support of state institutions and raise funds for such purpose by a general state tax. The legislature may likewise empower any of the governmental subdivisions of the state to levy and collect taxes for similar purposes in the exercise of their delegated governmental powers. If the exercise of the taxing power in any instance is regarded by the people as unwise, unjust or oppressive, the remedy must be sought through the action of the legislature. The judicial department of the state is powerless to grant relief on those grounds. *State, ex rel. v. Board, etc., supra; Lowe v. Board, etc., supra.*

The complaint alleges that the statute under consideration conflicts with several provisions of the state

Constitution. It is asserted that the operation

9. of the act will result in an injury to appellee in respect to his property for which no remedy is afforded by due course of law, in violation of the rights guaranteed by §12 of our Bill of Rights. The discussion of the "due process of law" provision of the federal Constitution is applicable to this section of the state Constitution. For the reasons there stated appel-



lee will not suffer any legal injury to his property rights for which a remedy is not afforded by due course of law.

The act, *supra*, does not conflict with §21 of Art. 1 of the state Constitution, which provides that no man's property shall be taken by law without just com-

12. pensation, for the reason that this prohibition does not extend to the general taxing power. *State v. Richcreek* (1906), 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. 491, 10 Ann. Cas. 899; *Hanly v. Sims* (1910), 175 Ind. 345, 93 N. E. 228, 94 N. E. 401.

By §1, Art. 10, of the state Constitution, the legislature is required to provide by law for a uniform and equal rate of taxation and assessment. There is

13. nothing in the act in question which conflicts with this provision of the Constitution. The fund to be provided in any county under the provisions of the act to pay its part of the costs of the improvements of highways is raised by a general tax on the property of the county levied and collected as other taxes are levied and collected. The fact that the tax rate in counties where extensive improvements are made under the law may be greater than the tax rate in other counties where no improvements are made, or in counties where the improvements thereunder are less extensive, does not signify that the rates of taxation are not uniform within the meaning of the Constitution. Each county is a separate unit for the purpose of taxation, and it cannot be maintained that, within the county making the improvement, the tax levy is unequal.

It is claimed that the title of the act fails to conform with §19, Art. 4, of the Constitution, in that the subject of the act as stated in the title does not cover

14. certain provisions contained in the body of the act. Where the general subject of an act is ex-

pressed in the title, it is not necessary that mat-  
15. ters properly connected therewith shall be also  
expressed in the title. *Kaufman v. Alexander*  
(1909), 173 Ind. 136, 141, 88 N. E. 502. It is not nec-  
essary that the title should contain a complete abstract  
of the contents of an act. If a title expresses the gen-  
eral purpose of the act, everything contained in the  
body of the act which is germane to such purpose or  
properly connected therewith as a means of making the  
act effective to accomplish the purpose is covered by the  
title. *Western Union Tel. Co. v. Braxton* (1905), 165  
Ind. 165, 74 N. E. 985. The selection of roads to be  
improved under the act is reasonably connected with  
the improvement of highways, and the appropriation  
of money and the levy of taxes to raise funds to pay  
for such improvements must be regarded as being prop-  
erly connected with the subject of the act as expressed  
in the title.

While the act in question relates to the improvement  
of highways, it is in no sense a local or a special  
15. law so as to bring it within the inhibition of §22,  
Art. 4, of the state Constitution.

A further objection to the law is predicated on the  
proposition that it invades the reserved powers of the  
people in several particulars mentioned. Just  
16. what is meant by the "reserved power of the  
people" is not clear. There are certain provi-  
17. sions of the Constitution by which the govern-  
mental powers delegated by that instrument  
18. to the several departments of government are  
limited and restricted so as to preserve inviolate  
certain fundamental rights of the people. Most of such  
provisions are embodied in Article 1 of the Constitution,  
known as the Bill of Rights, but specific limitations may  
be found in other parts of the instrument. If the term  
"reserved power of the people" is intended to apply to

some power which the people expressly reserved unto themselves by the terms of the Constitution, the provision of that instrument by which such reservation is made should be called to the attention of this court. As this is not done, it must be presumed that the term is used with reference to some supposed governmental power which the people impliedly reserved unto themselves at the time the Constitution was framed and adopted. Such an application of the term rests upon two assumptions, of which the first is that, originally, all governmental power rested in the people, and the second is that when they framed and adopted the Constitution they delegated a part of this power, but not all of it, to the various departments of government provided for in that instrument. Unless both of the propositions thus assumed are true, there can be no reserved powers of government in the people in the sense that appellee imputes to the term. The proposition involved in the first assumption may be granted as true, but to admit the truth of the second proposition would be to construe the state Constitution as a limited grant of power instead of a delegation of full power with express limitations.

Under such a construction, the general assembly would possess no power to legislate on a given subject unless a grant of such power could be found in

18. the Constitution. This is the rule which governs Congress under the federal Constitution which expressly confers on Congress the power
19. to legislate on certain designated subjects. No general power of legislation is conferred on Congress by the Constitution, and it has been uniformly held that all legislative power not expressly conferred on Congress is reserved to the several states. *McGuire v. Chicago, etc., R. Co.* (1906), 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; *Holden v. Hardy* (1896), 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103; *Nitka*

v. *Western Union Tel. Co.* (1912), 149 Wis. 106, 135 N. W. 492, 49 L. R. A. (N. S.) 337, Ann. Cas. 1913C 863; *State v. Hyman* (1904), 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742; 6 R. C. L. 136, §136; *Hurtado v. California* (1883), 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232; *Railroad Co. v. County of Otoe* (1872), 16 Wall. 667, 21 L. Ed. 375. The reverse of this rule applies to the construction of state Constitutions. The Constitution of this state carries a general grant of legislative power. The language is: "The legislative authority of the state shall be vested in the general assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: 'Be it enacted by the general assembly of the State of Indiana'; and no law shall be enacted, except by bill." This section confers power to enact any law on any subject except in so far as the other express provisions of the instrument narrow, limit or deny the power. *Townsend v. State* (1896), 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. 477; *State, ex rel. v. McClelland* (1894), 138 Ind. 395, 37 N. E. 799; *Hedderich v. State* (1885), 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; *Mount v. State, ex rel.* (1883), 90 Ind. 29, 46 Am. Rep. 192; *Beauchamp v. State* (1842), 6 Blackf. 299; *Firemen's, etc., Assn. v. Lounsbury* (1859), 21 Ill. 510, 74 Am. Dec. 115.

The courts of this state have generally followed this rule of constitutional construction. There are two recent cases, however, which some regard as a de-

18. parture from the rule, in that they seem to recognize a residue of legislative power abiding in the people. *Ellingham v. Dye* (1912), 178 Ind. 336, 99 N. E. 1, 29, Ann. Cas. 1915C 200; Id. 231 U. S. 205, 58 L. Ed. 206; *Bennett v. Jackson* (1917), 186 Ind. 533, 116 N. E. 921. The question involved in both of these cases was the power of the general assembly to provide by

law a method to be pursued by the people in the adoption of a new constitution for the state. In view of the questions which were before the court for consideration in those cases, it is apparent that the reserved power of the people, as recognized by these opinions, refers only to the inherent and indefeasible power of the people to alter and reform their government by the adoption of a new constitution. The scope of these decisions must be confined to legislation the effect of which would be to deny, limit, or impair this inalienable right of the people. They cannot be regarded as recognizing a reserved power in the people in any broad or general sense of the term. The writer, being of the opinion that the power of the general assembly in the legislative field is limited only by the restrictions and limitations placed on such power by the provisions of the Constitution, was unable to assent to the doctrine announced in those opinions. *Bennett v. Jackson, supra*, dissenting opinion. Even though a reserved power in the people

20. were admitted in the limited sense in which it is recognized in the two cases last cited, the admission could not avail appellee, as no such question is presented in this case. By the creation of the highway commission the law does not establish a new department of government, as contended. The commission is an administrative body intrusted with the

21. application and administration of the statute under which it is appointed. In this respect it is similar to the state board of tax commissioners, the Public Service Commission, and other boards and commissions created under the laws of this state. The law is not open to the objection that it confers powers of a judicial nature on a body that is administrative in its character.

One or two other objections of minor importance are urged against the validity of the act. None of these can

be sustained. After a careful consideration of the act in connection with the various provisions of the state and the federal Constitutions to which attention has been directed, the court is of the opinion that the act does not conflict with or otherwise violate any of such constitutional provisions. The law is therefore valid.

The complaint was based solely on the theory that the act under which appellants were proceeding was illegal and void, and the ruling of the trial court on the demurrer and the judgment based on such ruling rests on the same theory. The court erred in its ruling on the demurrer, and for this reason the judgment must be reversed.

The judgment is reversed, with instructions to sustain the demurrer of appellants to the complaint.

NOTE.—Reported in 121 N. E. 433. Highways: taxation for, 16 Am. St. 368; validity of statute assessing cost of construction or repair of rural highway on land benefited, Ann. Cas. 1913D 550. See under (1, 2) 12 C. J. 1194; (3) 37 Cyc 971; (4) 37 Cyc 763; (5) 37 Cyc 720; (6, 7) 37 Cyc 720, 723, 724; (8) 37 Cyc 329, 1140, 1232; (9) 37 Cyc 320; (10) 37 Cyc 720, 725; (11) 12 C. J. 887; (12) 15 Cyc 559; (13) 37 Cyc 749; (14) 36 Cyc 1028; (15) 36 Cyc 1037; (17) 12 C. J. 785; (18) 12 C. J. 745.

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### BARKER v. STATE OF INDIANA.

[No. 23,133. Filed October 30, 1918. Rehearing denied April 22, 1919.]

1. CRIMINAL LAW.—*Former Jeopardy.—Overruling Plea of.—Harmless Error.*—Since evidence of former jeopardy is admissible under a plea of not guilty (§2069 Burns 1914, Acts 1905 p. 584, §198), the sustaining of a demurrer to a special plea thereof was not harmful error. p. 266.
2. CRIMINAL LAW.—*Harmful Ruling.—Duty to Show Error.*—It is the duty of one who assigns as error the sustaining of a demurrer to a special plea to show that such ruling deprived him of an advantage that was not, or could not be, accorded him under the general issue, since the burden of showing error is on the appellant. p. 267.
3. CRIMINAL LAW.—*Discharge of Defendant.—Motion.—Sufficiency.*—The defendant's motion for a discharge, under §2091

Burns 1914, Acts 1905 p. 584, §220, because of delay in the trial, was properly denied where the motion failed to show that the delay was not due to his own act, in view of the rule that a party claiming the benefit of a statute must bring himself clearly within its provisions. p. 267.

4. **CRIMINAL LAW.—Appeal.—Briefs.—Sufficiency.**—The rules of the Supreme Court require that the appellant's brief shall be so prepared that the questions presented can be intelligently considered by the court without resort to the record; and all questions in the presentation of which there has not been a good-faith effort to comply with such rules will be deemed as waived. p. 268.
5. **CRIMINAL LAW.—Appeal.—Briefs.—Condensed Recital of Evidence.**—Where, from information contained in the appellant's brief, it may be assumed that causes in a motion for new trial are based on §2158, cl. 9, Burns 1914, Acts 1905 p. 584, §282, which provides that a new trial shall be granted when the verdict of the jury is contrary to law, or is not sustained by sufficient evidence, the court on appeal, under the fifth clause of Rule 22, will look to the appellant's condensed recital of the evidence in the consideration of such question. p. 268.
6. **CRIMINAL LAW.—Appeal.—Briefs.—Sufficiency.**—The conclusions of counsel as to the facts established by the evidence is insufficient to present the question of the sufficiency of the evidence to sustain the verdict under Rule 22 of the Supreme Court, which requires a condensed recital of the evidence in narrative form. p. 269.
7. **CRIMINAL LAW.—Appeal.—Briefs.**—In presenting the question of the sufficiency of the evidence, it is the appellant's duty to point out wherein the evidence is insufficient to support the verdict. p. 269.
8. **CRIMINAL LAW.—Appeal.—Review.—Evidence.—Verdict.**—In determining the sufficiency of the evidence to support the verdict, the Supreme Court will not weigh conflicting evidence, but will consider only the evidence most favorable to the appellee. p. 269.
9. **CRIMINAL LAW.—Instructions.—Given and Refused.**—Tendered instructions that were covered by others given were properly refused. p. 270.
10. **CRIMINAL LAW.—Instructions Contrary to Evidence.—Refusal.**—Instructions assuming that there was no evidence tending to show that an accused's reputation for truth, veracity, and moral character was not good, were properly refused where three witnesses had testified that his reputation for morality was bad. p. 270.
11. **CRIMINAL LAW.—Appeal.—Briefs.—Reasons for Giving Re-**

*quested Instruction.*—Alleged error in the refusal of an instruction relative to the misconduct of counsel presents no question for review where the appellant's brief contains no statement of the record showing any reason for the giving of such instruction. p. 270.

12. CRIMINAL LAW.—*Evidence.*—*Previous Acts.*—*Admissibility.*—In a prosecution of a defendant, under Acts 1907 p. 85, for having carnal knowledge of a female child under sixteen years of age, there was no error in permitting the prosecuting witness to answer questions as to other acts of intercourse had with the defendant within the period of two years previous to the date alleged in the indictment, such evidence being admissible to show the lustful disposition of the defendant and the existence and continuance of the illicit relation. p. 271.
13. RAPE.—*Evidence.*—*Want of Chastity.*—*Specific Acts.*—In a prosecution of a defendant, under Acts 1907 p. 85, for having carnal knowledge of a female child under sixteen years of age, it was not error to refuse to permit the prosecuting witness to answer, on cross-examination, questions as to whether she had ever had sexual intercourse with persons other than the defendant previously to a certain date, such evidence not being admissible as a defense to the charge, or as tending to show her chastity or unchastity or whether the offense charged was with or without her consent. p. 272.
14. CRIMINAL LAW.—*Former Jeopardy.*—*Burden of Proof.*—A former acquittal is in the nature of an affirmative defense, and the burden of proving it is on the defendant. p. 273.
15. CRIMINAL LAW.—*Former Jeopardy.*—A defendant in a criminal prosecution who has pleaded not guilty to a valid indictment, and has been acquitted in a trial before a jury lawfully empaneled and sworn, cannot be legally tried again for the same offense. p. 274.
16. CRIMINAL LAW.—*Former Jeopardy.*—The acquittal of an accused in a criminal proceeding is not a bar to a second prosecution where the facts necessary to a conviction therein would not necessarily have convicted in the former prosecution. p. 274.
17. RAPE.—*Separate Offenses.*—*Statute.*—*Construction.*—Each act of intercourse with a female child under the age of sixteen, under Acts 1907 p. 85, constitutes a distinct offense. p. 274.

From Pulaski Circuit Court; *William C. Pentecost*, Judge.

Prosecution by the State of Indiana against Nathan T. Barker. From a judgment of conviction, the defendant appeals. *Affirmed.*



*Caleb W. Barker and McConnell, Jenkines & Jenkines*, for appellant.

*Evan B. Stotsenburg*, Attorney-General, *Thomas H. Branaman* and *James A. Dilts*, for the state.

MYERS, C. J.—Appellant was indicted, tried and convicted on an indictment which charged him with carnal knowledge of a female child under sixteen years of age. Acts 1907 p. 85, §2250 Burns 1908. The indictment was returned April 23, 1913, and alleged that the offense was committed on or about July 26, 1912. To this indictment appellant pleaded specially, averring in substance that on April 23, 1913, two indictments were returned against him, both for criminal assault upon the same person, one charging the offense as having been committed on or about January 1, 1909, and the other on or about July 26, 1912; that he was arrested, tried before a jury, and acquitted of the offense charged as of January 1, 1909; that the state in the trial of that cause introduced evidence and facts before the jury touching all times and dates without reference to the time and date laid in the indictment, and also interrogated and cross-examined this appellant generally as to whether he was guilty of the offense charged; that the evidence to prove the charge in the present indictment will be the same and no wise different from that produced against him at the former trial. A demurrer to this answer for want of facts was sustained, and this ruling is assigned as error.

Whatever may be said for or against the sufficiency of this answer is immaterial, for, under the recent holdings of this court, it is unnecessary for us to deter-

1. mine the sufficiency of a special plea where the evidence to support the same is admissible under the general issue. *Lucas v. State* (1909), 173 Ind. 302, 90 N. E. 305; *Williams v. State* (1907), 169 Ind. 384,

83 N. E. 790; *Boxell v. Bright Nat. Bank* (1915), 184 Ind. 631, 634, 112 N. E. 3; L. R. A. 1917A 1235, note. Former jeopardy was the theory of this answer, and, while our Criminal Code authorizes any matter of defense to be pleaded specially, yet it also provides that a defendant in a criminal prosecution under a plea of not guilty may prove on the trial that he has before had judgment of acquittal for the same offense. 'Acts 1905 p. 584, §198, §2069 Burns 1914.

Appellant has failed to point out any advantage to which he was entitled under his special plea that was not, or could not properly have been accorded him;

2. under the general issue. The burden is on him to show that the ruling of which he complains was harmful, and, failing so to do, his contention must be denied. *Groff v. Clark* (1896), 146 Ind. 52, 44 N. E. 803; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 623, 103 N. E. 652; *Ward v. State* (1912), 179 Ind. 524, 101 N. E. 809; *City of Terre Haute v. Lauda* (1914), 58 Ind. App. 480, 108 N. E. 392.

Appellant's motion for a discharge under the provisions of §2091 Burns 1914, Acts 1905 p. 584, §220, was overruled and this ruling he assigns as error.

It is well settled in this state that where a party seeks the benefit of a statute he must bring himself clearly within its provisions. *Woodward v. State* (1910),

3. 174 Ind. 743, 93 N. E. 169; *Town of Windfall City v. State, ex rel.* (1910), 174 Ind. 311, 313, 92 N. E. 57; *Blair v. City of Fort Wayne* (1912), 51 Ind. App. 652, 657, 98 N. E. 736. In this case the motion fails to show that his trial was not delayed by his own act. This omission was fatal to the motion, and the ruling of the trial court must be sustained. *Klein v. State* (1901), 157 Ind. 146, 60 N. E. 1036; *City of Fort Wayne v. Bender* (1914), 57 Ind. App. 689, 105 N. E. 949.

Appellant next insists that the court erred in overruling his motion for a new trial.

His brief does not contain a copy of the motion or a statement from which all the questions sought to be presented may be intelligently considered without

4. going to the record. In *Dorsey v. State* (1912), 179 Ind. 531, 100 N. E. 369, it is said: "The rules of this court contemplate that appellant's brief shall be so prepared that each judge, by a consideration of the brief alone, and without examining the transcript, may intelligently consider each question presented. The rules further contemplate that the points on which appellant relies, must be definitely and specifically stated." From appellant's brief we learn that his motion for a new trial contains ninety-eight reasons or specifications of error, but we will consider only those where it appears that a good-faith effort has been made to present them. As to all others it must be understood that we regard them as having been waived.

He begins his statement of the motion by saying, "The first, second, third and fourth are statutory." Then follows a reference to the page and line of the

5. record where we assume the causes relied on may be found. Under the heading, "Propositions and Points by which Appellant Seeks a Reversal of the Judgment of Conviction," and referring to the overruling of his motion for a new trial, he makes the following points: "The verdict of the jury is contrary to and not sustained by the law or evidence." Also, "The absence of evidence in a criminal case may of itself be sufficient to entitle the defendant to go acquit." In his argument he asserts that the evidence is wholly insufficient to sustain the verdict. Following this assertion, he gives a history of the case leading up to the return of the indictment upon which he was tried and convicted. If from this information we may assume that the first,

second, third and fourth causes in appellant's motion are based on clause 9, §2158 Burns 1914, Acts 1905 p. 584, §282, which provides that a new trial shall be granted when the verdict of the jury is contrary to law, or is not sustained by sufficient evidence, then it would be our duty to look to appellant's condensed recital of the evidence as required by Rule 22, clause 5.

Turning to the evidence furnished in compliance with this rule, we find the names of many witnesses whose testimony, instead of being set forth in narra-

6. tive form, is for the most part the conclusions of counsel. This is not sufficient. *Rose v. City of*
7. *Jeffersonville* (1916), 185 Ind. 577, 114 N. E. 85.

These conclusions must be eliminated and can  
8. have no controlling force in determining the questions thus sought to be presented. However, we are advised from the evidence submitted, and which we may consider, that there is irreconcilable conflict in the testimony given at the trial by the prosecuting witness and that detailed to the jury by the appellant. In some particulars the testimony of both are slightly corroborated. Appellant has not assumed the responsibility of pointing out wherein the evidence is insufficient to support the verdict. This he should have done. *Bray v. Tardy* (1914), 182 Ind. 98, 105 N. E. 772. But from our examination of the evidence set forth in appellant's brief and by reference to the record, we conclude that the verdict is not without evidence to support it, and is not for that reason contrary to law. It is our province to consider only the evidence most favorable to appellee (*Reitz v. Hodgins* [1916], 185 Ind. 163, 112 N. E. 386; *Pittsburgh, etc., R. Co. v. Pence* [1916], 185 Ind. 495, 113 N. E. 7), and this done, we must conclude that the question of guilt or innocence of appellant was for the jury. This court's opinion on the weight of the evidence, or on the conclusion of the jury, will not, under

the well-settled rules of law, justify us in disturbing the judgment of the trial court. *McKeen v. A. T. Bowen & Co.* (1914), 182 Ind. 333, 341, 106 N. E. 529; *American, etc., Tin Plate Co. v. Reason* (1915), 184 Ind. 125, 110 N. E. 660; *Caldwell v. Ulsh* (1915), 184 Ind. 725, 734, 112 N. E. 518; *People v. Deatrick* (1916), 30 Cal. App. 507, 159 Pac. 175; *Parmalee v. State* (1916), 99 Neb. 598, 157 N. W. 1010; *State v. Bragdon* (1917), 136 Minn. 348, 162 N. W. 465; *People v. Edwards* (1916), 173 App. Div. 375, 159 N. Y. Supp. 410; *State v. Gaimos* (1916), 53 Mont. 118, 162 Pac. 596; *State v. Smith* (1917), 95 Wash. 271, 163 Pac. 759; *State v. Tinkler* (1905), 72 Kan. 262, 83 Pac. 830.

Our attention will be next given to the action of the court in refusing to give the jury certain instructions tendered by appellant. These instructions, nine

9. in number, we have carefully read, and have compared them with those given to the jury. From this investigation we conclude that all the instructions so tendered and refused were fully covered by the instructions given except two, one of which was on the subject of the presumption of law as applied to good moral character and to the benefit of which an accused on trial is entitled. This instruction assumes that no evidence was introduced at the trial tending to show that the reputation of appellant for truth and veracity and moral character was not good. The record discloses the names of three witnesses who testified that appellant's reputation for morality was bad. This instruction was not pertinent to the evidence, and no error intervened by refusing to give it.

The other of the two instructions was on the subject of misconduct of John M. Spangler while closing the argument for the state. Appellant's brief

11. contains no statement of the record showing any reason for giving this instruction. Consequently

no question is presented for our consideration. *Dorsey v. State, supra.*

Nor did the court err in refusing to give the other instruction. *Waldon v. State* (1914), 182 Ind. 112, 104 N. E. 300; *Thain v. State* (1914), 182 Ind. 345, 353, 106 N. E. 690; *Breadheft v. Cleveland* (1915), 184 Ind. 130, 136, 108 N. E. 5, 110 N. E. 662.

It is also contended that the court erred in permitting the prosecuting witness over appellant's objections to answer questions propounded by the state relat-

12. ing to his carnal knowledge of the witness prior to the date of the offense fixed in the indictment. The substance of the answers was that such relations occurred many times, not less than once a week covering a period of about four years. The objection was put upon the ground that the state having by its evidence fixed a date, July 26, 1912, as the date of the offense, it thereby elected to prosecute the defendant for the alleged crime of that date, and proof of other acts of sexual intercourse between the prosecuting witness and the defendant upon other dates, which are statements of separate offenses against the law, were improper. The question of the competency of this evidence was also saved by motions timely interposed to strike out. These motions, over appellant's objections and exceptions, were overruled. These rulings are questioned. As a general rule it may be said that, on the trial of a person accused of crime, proof of other offenses are inadmissible unless they are a part of the *res gestae*. 8 R. C. L. 198, §194; *People v. Thompson* (1914), 212 N. Y. 249, 106 N. E. 78. However, the rule in the class of cases to which the one at bar belongs is well stated in 16 C. J. 608, §1194, where it is said: "The general rule that evidence of other crimes is inadmissible does not apply to proof of other acts of sexual intercourse between the parties in statutory rape cases, that is, in

prosecutions for rape on a female under the age of consent, or on a woman imbecile, even though such other acts constitute separate and distinct crimes. Provided they are not too remote in time or otherwise, such other acts are relevant and admissible to show the lustful disposition of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged and to corroborate the testimony of the prosecutrix as to that act." See, also, *People v. Gray* (1911), 251 Ill. 431, 96 N. E. 268; *People v. Thompson*, *supra*; *State v. Hurd* (1897), 101 Iowa 391, 70 N. W. 613; *Morgan v. Commonwealth* (1916), 172 Ky. 684, 189 S. W. 943; 33 Cyc 1483.

It is also contended that the trial court erred in refusing to permit the prosecutrix to answer on cross-examination questions with reference to whether

13. or not she had ever had sexual intercourse with anyone prior to January, 1909. In support of this contention appellant makes the point that want of chastity of a child under the age of consent must be shown by specific acts, citing 33 Cyc 1481. This authority does state that specific acts with others than the defendant may be shown to rebut certain corroborating circumstances, but in this case none of the circumstances there mentioned are claimed to be present. This court in *Harper v. State* (1916), 185 Ind. 322, 114 N. E. 4, held such evidence admissible to explain incriminating circumstances proved by the state in corroboration of the prosecuting witness and for no other purpose. See, also, *State v. Rubertone* (1916), 89 N. J. Law 285, 98 Atl. 253. Cases may be found where specific acts tending to prove an unchaste character were admitted in evidence, but in all of these cases such evidence was admitted on the ground that previous chastity was put in issue by the charge in compliance with the statute defining the offense. *Woodruff v. State* (1904), 72 Neb.

815, 101 N. W. 1114; *State v. Kelley* (1905), 191 Mo. 680, 90 S. W. 834. The indictment in this case tendered no such issue, nor does the statute under which the indictment was drawn make previous chastity an element of the offense. The object desired by the introduction of the proposed testimony is not stated, but if the purpose of the questions to the witness was to show specific acts of sexual intercourse with other men as a defense to the charge, or as tending to show her general chastity or unchastity, or whether the sexual acts with appellant were with or without her consent, the evidence was properly excluded. *Heath v. State* (1909), 173 Ind. 296, 90 N. E. 310, 21 Ann. Cas. 1056; *Kidwell v. State* (1878), 63 Ind. 384; *State v. Smith* (1904), 18 S. D. 341, 100 N. W. 740; *Price v. State* (1902), 44 Tex. Cr. R. 304, 70 S. W. 966; *State v. Hilberg* (1900), 22 Utah 27, 61 Pac. 215; *State v. Williamson* (1900), 22 Utah 248, 62 Pac. 1022, 83 Am. St. 780

Appellant, in support of his defense of former acquittal, offered in evidence an indictment returned in the Pulaski Circuit Court, charging appellant on or about January 1, 1909, with having had carnal knowledge of the prosecutrix in the present case, and with the offense defined by §1 of an act approved February 26, 1907, Acts 1907 p. 85, *supra*; also an order-book entry of the Pulaski Circuit Court showing a return of the indictment in that court. An objection to the introduction of this evidence was sustained. What we may here say in disposing of the question on the admissibility of this evidence applies also to appellant's special plea.

A former acquittal is in the nature of an affirmative defense, and the burden of proving it was on the defendant. *State v. Williams* (1906), 43 Wash. 505, 14. 86 Pac. 847. It is no longer a question in this  
VOL. 188—18



state that when a defendant in a criminal prosecution who has entered a plea of not guilty is put on trial on a valid indictment before a jury lawfully impaneled and sworn, and a verdict of acquittal is returned, as claimed in this case, he cannot legally be tried again for the same offense. *Leach v. State* (1911), 177 Ind. 234, 97 N. E. 792; *Morgan v. State* (1859), 13 Ind. 215. It is equally well settled that where the facts necessary to a conviction upon a second prosecution would not necessarily have convicted upon the first prosecution, then such acquittal would not be a bar to a second prosecution. *State v. Reed* (1907), 168 Ind. 588, 81 N. E. 571; *Wilson v. State* (1855), 24 Conn. 57. In *Smith v. State* (1882), 85 Ind. 553, 557, it is said: "The true test to determine the sufficiency or insufficiency of a plea of former acquittal as a bar to the pending prosecution, is this, Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would be, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient."

It clearly appears from the indictment which appellant sought to introduce in evidence that the crime charged therein was committed on or about January 1, 1909, or more than two and one-half years prior to the commission of the alleged offense as laid in the present indictment, and relied on for a conviction as shown by the evidence. Granting that appellant was formerly tried and acquitted of the alleged offense of 1909, we are not persuaded, and it does not appear that the evidence introduced in that case would be sufficient to support a conviction of the charge in the present case. For aught appearing, we must take it for granted that the evidence admitted at the former trial tended only to prove guilt or innocence of the accused

at the time charged in the indictment. If that be true, and the statute offended be construed as making each of the alleged acts of sexual intercourse with the prosecutrix, who is shown to be under age of consent, a distinct offense, and we so construe it, then relevancy of the proposed evidence is not shown, and the ruling thereon would not be erroneous. The indictments under consideration each contain a single count and each rely upon a single offense, identified as January 1, 1909, and July 26, 1912. Under this showing of the record the state must convict, if at all, for the offense as laid. The evidence of other acts of the character charged in the indictments were admitted in evidence, not to prove independent offenses, but for the purpose of showing the relationship existing between the parties. The materiality of this evidence should be limited and clearly explained by instructions to the jury. For it is clear that "One rape cannot be included in another any more than one forgery or one murder can be included in another." *State v. Gaimos, supra*. The offense here charged is not a continuing one, as, for example, the operating of a place where intoxicating liquors are sold in violation of law. *Freeman v. State* (1889), 119 Ind. 501, 21 N. E. 1101; *Anderson v. State* (1917), 187 Ind. 94, 118 N. E. 567; *State v. Lindley* (1860), 14 Ind. 430.

The case of *State v. Healy* (1917), 136 Minn. 264, 161 N. W. 590, L. R. A. 1917D 726, in many material respects is not unlike the case at bar. The same question as here was presented and considered, and the court held that: "The acquittal of the defendant for the offense (rape) of January 16, 1914, is not a bar to the present prosecution for the offense (rape) of July 16, 1914."

No reversible error has been pointed out, and the judgment is therefore affirmed.

NOTE.—Reported in 120 N. E. 593. Rape: evidence, acts of familiarity or intimacy between prosecutrix and defendant, 11 Ann. Cas. 672. See under (12) 33 Cyc 1483; (13) 33 Cyc 1481; (14) 16 C. J. 425; (16) 16 C. J. 265.

### SHARP v. STATE OF INDIANA.

[No. 23,469. Filed May 8, 1919.]

1. CRIMINAL LAW.—*Rape.—Relation of Husband and Wife.—Defense.*—In a prosecution for rape upon a female child under the age of consent, though the part of the statute defining such offense makes no exception with regard to the husband of such female, the fact that the defendant is her husband may be proved as a defense. p. 278.
2. CRIMINAL LAW.—*Affidavit.—Rape.—Denial of Relation of Husband and Wife.*—An affidavit charging rape upon a female child under the age of consent was not defective for failure to state that such female was not then the wife of the defendant, since the part of the statute defining the offense makes no such exception. p. 278.
3. CRIMINAL LAW.—*Reasonable Doubt.—Subsidiary Evidence.*—The rule requiring the state to prove the defendant's guilt beyond a reasonable doubt applies only to the essential facts constituting the crime charged, and has no application to the proof of subsidiary facts that are not essential elements of the crime but which, if shown, tend to prove or to disprove one or more of the essential elements. p. 279.
4. CRIMINAL LAW.—*Reasonable Doubt.—Evidence.—Essential and Subsidiary Facts.*—Subsidiary facts need not be proved beyond a reasonable doubt to justify a conviction; it is the facts essentially necessary to constitute the crime that must be so proved; but, since a reasonable doubt as to the essential facts may arise from a consideration of evidence adduced in support of subsidiary facts, it was error for the court to give an instruction that excluded evidence bearing on the question of reasonable doubt from the consideration of the jury by the statement that a reasonable doubt could not spring from subsidiary evidence. (*Hauk v. State*, 148 Ind. 248, disapproved in part.) pp. 279, 281.
5. CRIMINAL LAW.—*Erroneous Instruction.—Exclusion of Evidence.—Reversible Error.*—In a prosecution for rape upon a female child under the age of consent, an instruction that excluded from the consideration of the jury evidence, though subsidiary,

as to the date on which the offense was committed, and which tended to break down the essential fact that the child at the time was under the age of consent, constituted such error that the Supreme Court cannot say that the defendant was so clearly guilty as to render the instruction harmless, though the fact of intercourse was not disputed. p. 281.

From Hamilton Circuit Court; Ernest E. Cloe, Judge.

Prosecution by the State of Indiana against John Sharp. From a judgment of conviction, the defendant appeals. *Reversed.*

*Albert C. Pearson, Christian, Christian & Waltz*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for appellee.

LAIRY, J.—Appellant was charged with the crime of rape committed against the person of a child under the age of consent. A trial by jury resulted in a judgment of conviction, to reverse which this appeal is prosecuted. It is asserted that the amended affidavit on which the judgment rests does not state facts sufficient to constitute a public offense, and that, for the reason stated, the trial court erred in overruling appellant's motion to quash the affidavit, and also in overruling his motion in arrest of judgment. This question is presented by the first and fourth assignments of error. The only particular in which it is claimed that the affidavit is defective is that it does not state that the child against whom the offense was committed was not at the time the wife of the accused. It is true that a husband cannot be guilty of the crime of rape by having carnal knowledge of his wife without her consent and against her will or on account of her being under the age of consent, or on account of her being insane, epileptic or imbecile. In the definition of the offense as applicable to women who are insane, or who are idiotic or otherwise imbecile, the statute of this state expressly

1. excepts the husband of such a woman from its operation; but as to other women against whom the offense may be committed it makes no such express exception with regard to the husband. The statute, however, cannot apply to the husband of the injured party in any case.

The question here presented relates to the manner in which the offense must be charged. Wharton states

that the indictment need not allege that the fe-

2. male outraged was not the wife of the defendant, citing a number of decisions which sustain the text. 1 Wharton, Criminal Law (11th ed.) §741. In the case of *Commonwealth v. Fogerty*. (1857), 8 Gray (Mass.) 489, 69 Am. Dec. 264, the court says: "Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegations." It may be shown as a defense that the woman against whom the offense is alleged to have been committed is the wife of the person who is charged with committing the rape, but it is not necessary to negative this fact in the indictment. *Curtis v. State* (1909), 89 Ark. 394, 117 S. W. 521; *State v. Morrison* (1912), 46 Mont. 84, 125 Pac. 649; *State v. Williamson* (1900), 22 Utah 248, 62 Pac. 1022, 83 Am. St. 780; *State v. White* (1890), 44 Kan. 514, 25 Pac. 33.

If the statute under which the indictment is drawn excludes from its operation the husband of a female against whom the offense may be committed, the

1. indictment must conform to the statute in that particular. *People v. Burke* (1868), 34 Cal. 661; *Cutler v. State* (1914), 15 Ariz. 343, 138 Pac. 1048; *People v. Stowers* (1912), 254 Ill. 588, 98 N. E. 986. The portion of the statute on which the affidavit in this

case is based makes no such exception. The affidavit is sufficient.

Under his motion for a new trial which is assigned as error appellant presents objections to several instructions. The part of instruction No. 18 to which objection is made reads as follows: "And by reasonable doubt is not meant a whim or captious or speculative doubt; it is properly termed a reasonable doubt as distinguished from an unreasonable or speculative doubt, and it must arise from all the evidence relating to some material fact or facts charged in the affidavit, and not spring from mere subsidiary evidence. Such doubt may also arise from the absence of evidence as to material matters." The objection is specifically directed to that part of the instruction which tells the jury that a reasonable doubt cannot spring from mere *subsidiary evidence*.

The rule which requires the state to prove the guilt of the defendant beyond a reasonable doubt applies only to the essential facts constituting the crime

3. charged; but the rule does not apply to the proof of subsidiary facts which are not essential elements of the crime, but which, if shown to exist, have a tendency to prove or to disprove one or more of the constituent elements of the crime. *Wade v. State* (1880), 71 Ind. 535; *Hinshaw v. State* (1896), 147 Ind. 334, 47 N. E. 157.

While it is not necessary to a conviction that such subsidiary facts be proved beyond a reasonable doubt, it is still the law that the essential facts which

4. constitute the offense must be established by that degree of proof before a conviction is justified; and, in determining whether such essential facts are established beyond a reasonable doubt, the jury may consider the whole of the evidence as well as the want or absence of evidence. Can it be truly said that the

jury cannot consider evidence adduced to prove a subsidiary fact in determining whether an essential fact is established beyond a reasonable doubt? If, after considering all the evidence in the case, the jury entertains a reasonable doubt as to any essential fact constituting an element of the offense, the defendant is entitled to an acquittal whether such doubt arises from the evidence or the lack of evidence. In determining whether such a doubt arises from the evidence, the jury has a right to consider the whole evidence, and the defendant has a right to have the entire evidence so considered. The court cannot correctly exclude from the consideration of the jury, on such questions, the evidence adduced in support of subsidiary facts. If, after considering the entire evidence, the jury entertains a reasonable doubt as to the fact essential to constitute the offense, the defendant is entitled to the benefit of such doubt, even though it arises from the consideration of evidence adduced in support of a subsidiary fact. The language to which the specific objection is made renders the instruction erroneous.

The trial court in giving the instruction in question probably followed *Hauk v. State* (1897), 148 Ind. 238, 46 N. E. 127, 47 N. E. 465, where a similar instruction was approved by this court. The court in that case approved the language of the instruction on the authority of *Wade v. State*, *supra*, saying that the law as declared in the instruction was in accord with the law as stated in the case cited. The case cited goes only to the extent of holding that the rule requiring proof beyond a reasonable doubt in a criminal case applies to essential facts constituting the offense, and that the rule does not apply to proof of subsidiary facts. In this regard, the case was followed in *Hinshaw v. State*, *supra*. In the case of *Hauk v. State*, *supra*, the learned court failed to observe the distinction which clearly

exists between the rule of law as stated in *Wade v. State, supra*, and the rule stated in the instruction under consideration.

Subsidiary facts need not be proved beyond a reasonable doubt to justify a conviction; it is the facts essentially necessary to constitute the crime which

4. must be so proved; but a reasonable doubt as to such essential facts may arise from a consideration of evidence adduced in support of subsidiary facts. The court declines to follow the ruling in the case of *Hauk v. State, supra*, in so far as it approves the language of the instruction which is held in this case to constitute error. No authority is found to sustain the instruction other than that of *Hauk v. State, supra*, and that case has not been cited to the direct point under consideration in any later decision. A part of the evidence bearing on the question of reasonable doubt is excluded from the consideration of the jury by the statement that a reasonable doubt cannot spring from subsidiary evidence. It is true that by other instructions the jury was told that the entire evidence should be considered on the question of reasonable doubt, but these instructions are in conflict with that part of instruction No. 18 held to be erroneous. When the instructions are considered together, the jury was given a choice between truth and error, and this court has no means of knowing whether it followed the erroneous rule stated in instruction No. 18, or the correct rule stated in other instructions. *Burrows v. State* (1894), 137 Ind. 474, 37 N. E. 271, 45 Am. St. 210; *Hampton v. State* (1902), 160 Ind. 575, 67 N. E. 442.

The state contends that, even though the instruction in question be erroneous, the judgment should not be reversed for the reason, as stated, that the guilt

5. of appellant is shown so conclusively by the evidence that no other verdict could have been right-



fully rendered. The court is of the opinion that the evidence in this case is not of a character to justify the application of the rule which the state seeks to invoke. It is true that the evidence shows without dispute that the appellant had sexual intercourse with the prosecuting witness, but there is conflict in the evidence as to the date on which the first act of intercourse occurred. The prosecuting witness fixed the time as August 31, 1915, stating that it took place on a night when Mr. James Beam and his wife stayed all night at the house of defendant. Mr. Beam and his wife both testified that they stayed all night at the home of defendant only once while the prosecuting witness lived in his home, and that the time when this occurred was in the first part of April, 1916. The evidence shows without dispute that the prosecuting witness was born on January 10, 1900. It thus appears that, if the first act of intercourse occurred when the Beams stayed all night at defendant's house, and if that was in April, 1916, the prosecuting witness was not under sixteen years of age at the time. To sustain a conviction, it was necessary for the state to prove beyond a reasonable doubt that the prosecuting witness was under sixteen years of age at the time the act of intercourse relied on occurred. This was an essential fact constituting an element of the offense. As bearing on this fact, the jury had a right to consider the evidence of James Beam and his wife in connection with the other evidence in the case; and the defendant should have been acquitted, if the jury entertained a reasonable doubt as to whether the prosecuting witness was under or over the age of sixteen years at the time the act was committed. The date on which James Beam and his wife stayed over night in the home of appellant was a subsidiary fact and the evidence bearing thereon was subsidiary evidence which, under the instruction held to be erroneous, the jury might well

have excluded from consideration in so far as it had any bearing on the question of reasonable doubt. In view of the evidence, it cannot be said that appellant was so clearly guilty as to render the instruction harmless.

The judgment of the trial court is reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 123 N. E. 161. See under (1, 2) 33 Cyc 1444; (3) 16 C. J. 780; (4) 17 C. J. 340; (5) 33 C. J. 1491.

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### WILLIAMS v. STATE OF INDIANA.

[No. 23,190. Filed May 9, 1919.]

1. CONSPIRACY.—*Indictment.—Sufficiency.*—An indictment for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, to be good as against a motion to quash, must not only state facts showing the conspiracy, but must also charge the felony with the same particularity as though the accused were to be tried for the felony alone. p. 288.
2. INDICTMENT AND INFORMATION.—*Motion to Quash.—Defects Appearing on Face of Indictment.*—Under the Criminal Code, defects not appearing on the face of an indictment cannot be raised by a motion to quash; and, though such defects do so appear, if the offense is charged with such a degree of certainty that the defects do not tend to prejudice the substantial rights of the defendant, they must be disregarded. pp. 288, 291.
3. CONSPIRACY.—*To Commit Felony.—Bribery.—Indictment.—Sufficiency.—Failure to State Names of Persons to be Solicited.*—An indictment of a deputy prosecuting attorney and other officers under §§2647, 2878 Burns 1914, Acts 1905 p. 584, §§641, 477, charging that many persons were engaged in operating gambling places, etc., in violation of law and that the defendants "did then and there feloniously and knowingly unite, combine, conspire and confederate together" to solicit bribes from persons engaged in such unlawful businesses or who might thereafter be so engaged, was sufficient as a charge of the crime under the statute, although it did not allege that the conspirators knew of specific violations or that they knew the names of persons actually engaged in such businesses, since the conspiracy sought to be charged was the combination of two or more persons by some concerted action to accomplish an act or purpose defined by statute as a felony, and the crime

was complete when the unlawful confederation was formed to do the acts charged. p. 292.

4. **INDICTMENT AND INFORMATION.**—*Solicitation of Bribes.*—*Names of Persons Solicited.*—An indictment of public officers for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, containing the statement that a specified sum was actually paid to the conspirators, was not fatally defective for failing to state the names of the contributors, in view of another allegation therein that the conspiracy was formed to solicit bribes not only from persons engaged in illegal business, but from those who might thereafter engage in such business, and for the further reason that the allegation of the receipt of the specified sum does not necessarily show that the grand jurors knew the names of the contributors or that the evidence before them on that subject was satisfactory. p. 293.
5. **CONSPIRACY.**—*Indictment.*—*Solicitation of Bribes.*—*Overt Acts.*—An indictment for conspiracy to solicit bribes in violation of §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, need not show overt acts done in pursuance of the conspiracy. p. 293.
6. **INDICTMENT AND INFORMATION.**—*Conspiracy.*—*Soliciting Bribes.*—*Names of Persons Solicited.*—In a prosecution of public officers for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, if the names of the persons to be solicited were known, or if they were reasonably ascertainable by the grand jury, they should have been pleaded. p. 293.
7. **INDICTMENT AND INFORMATION.**—*Particularity.*—Where an offense is pleaded with such identity or certainty that the accused is enabled to plead his conviction or acquittal in bar of another prosecution therefor, the rule requiring particularity in charging the offense is satisfied. p. 294.
8. **INDICTMENT AND INFORMATION.**—*Conspiracy.*—*Soliciting Bribes.*—*Failure to State Names.*—In a prosecution for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, the statement in the indictment of the fact that the names of the persons solicited or to be solicited are unknown is sufficient excuse for failing to name such persons. p. 294.
9. **INDICTMENT AND INFORMATION.**—*Conspiracy.*—*Soliciting Bribes.*—A deputy prosecuting attorney and certain officers of a city charged with official duties pertaining to the enforcement of the criminal laws of the state may be jointly indicted under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, for conspiracy to solicit bribes, and they need not be

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Williams v. State—188 Ind. 283.

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- charged and tried singly under the bribery statute, for, though each of such officers performed a different duty, they controlled the criminal procedure required to bring violators of the law before the courts. p. 294.
10. CONSPIRACY.—*Soliciting Bribes.*—*Ownership of Money.*—*Indictment.*—An indictment of a deputy prosecuting attorney and other officials for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, need not directly allege that the money, etc., was the property of the persons to be solicited, in view of the well-defined meaning of the word "bribe." p. 295.
11. BRIBERY.—*"Bribe."*—*Definition.*—A bribe is any gift, advantage, or emolument offered, given, or promised to, or asked or accepted by, any public officer to influence his behavior in office. p. 296.
12. CONSPIRACY.—*Merger in Crime Committed.*—Where an indictment charges a conspiracy and also an overt act which in itself is criminal, the conspiracy is not merged in the higher offense, in case the defendant is placed on trial upon the charge of conspiracy only. p. 296.
13. INDICTMENT AND INFORMATION.—*Conspiracy.*—*Duplicity.*—An indictment, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, for conspiracy to solicit bribes is not bad for duplicity, though it charged that solicitations were to be made upon many persons who were engaged in various illegal businesses so classified as to bring them within the prohibition of statutes pertaining to specifically defined crimes. p. 297.
14. INDICTMENT AND INFORMATION.—*Conspiracy to Commit Felony.*—*Certainty.*—An indictment for conspiracy to commit a felony which is sufficient to enable the court and the jury to understand distinctly the issue to be tried, and to fully inform the defendant of the nature of the offense charged, and upon which a judgment may be pronounced on a conviction according to the rights of the case, is sufficient as against a motion to quash for uncertainty. p. 297.
15. CRIMINAL LAW.—*Plea in Abatement.*—*Challenge of Grand Juror.*—Section 1965, cl. 7, Burns 1914, Acts 1905 p. 584, §97, permitting one charged with a felony to challenge an individual grand juror before the jury is sworn on the ground that he cannot act impartially and without prejudice to the substantial rights of the challenger, does not permit the challenge for such cause by plea in abatement after indictment. p. 298.
16. CRIMINAL LAW.—*Demurrer to Plea in Abatement.*—*Admission.*—A demurrer to a plea in abatement admits all the facts of the plea well pleaded. p. 300.

17. **CRIMINAL LAW.—*Plea in Abatement.—Validity.***—A plea in abatement not denying the merits of a prosecution, and only tending to delay the remedy, will be upheld only after strict construction. p. 301.
18. **CRIMINAL LAW.—*Appointment of Special Prosecutor.—Presumption.***—The action of the trial court in appointing a special prosecuting attorney, who acted as such before the grand jury that returned an indictment against a deputy prosecuting attorney, and to which objections were raised by plea in abatement, will be presumed to be correct on appeal, in the absence of a showing of the facts that were before the court at the time of the appointment. p. 301.
19. **CRIMINAL LAW.—*Special Prosecutor.—Appointment by Trial Court.***—Though no statute expressly authorizes the appointment of a special prosecuting attorney to appear before the grand jury, or to assist the prosecuting attorney in the trial of criminal cases, the courts having general jurisdiction of criminal matters has the inherent power in their discretion to appoint an attorney to assist the prosecuting attorneys in the trial of criminal cases. p. 301.
20. **CRIMINAL LAW.—*Grand Jury.—Presence of Special Prosecutor.***—In view of §1980 Burns 1914, Acts 1905 p. 584, §109, requiring prosecuting attorneys to appear before the grand jury, and §9406 Burns 1914, §5864 R. S. 1881, requiring them to conduct prosecutions for felonies, the presence of a specially appointed prosecuting attorney at deliberations of the grand jury and his insistence that the defendant be indicted on the testimony was unauthorized, as there must be no opportunity for the improper influence upon the grand jury after the investigation is closed, and was therefore a good ground of abatement. pp. 302, 303.

Appeal from the Delaware Circuit Court; *Fred C. Gause*, Special Judge.

Prosecution by the State of Indiana against Gene Williams. From a judgment of conviction, the defendant appeals. *Reversed.*

*George W. Cromer* and *Harry Long*, for the appellant.

*Ele Stansbury*, Attorney-General, *U. S. Lesh*, *Edward M. White*, *Elmer E. Hastings*, *John G. McCord*, *Horace G. Murphy*, and *Wilbur Ryman*, for the state.

**MYERS, J.**—This is a prosecution by the state against the appellant and six other persons upon a joint indict-

ment charging them with a felonious conspiracy to solicit bribes. The indictment is in one count. Defendants, after severally and unsuccessfully moving to quash the indictment, filed a plea in abatement in ten paragraphs, to which a demurrer to the first nine paragraphs was sustained, and the tenth paragraph, on motion, was stricken out. Appellant's separate and several motion for an order requiring the state to file a bill of particulars was overruled. Appellant then waived arraignment and entered his plea of not guilty. His request for a separate trial was granted; trial was had by jury resulting in a verdict of guilty. Thereafter various motions were each overruled. Judgment followed, assessing his fine at \$200 and costs, and imprisonment from two to fourteen years in the state reformatory. From this judgment he appeals and assigns as error: (1) The overruling of his motion to quash the indictment. This indictment is predicated on §§2647, 2378 Burns 1914, §§641, 477, Acts 1905 p. 584. Section 2647 reads as follows: "Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, within or without this state; or any person or persons who shall knowingly unite with any other person or persons, body, association or combination of persons, whose object is the commission of a felony or felonies, within or without this state, shall, on conviction, be fined not less than twenty-five dollars nor more than five thousand dollars, and imprisoned in the state prison not less than two years nor more than fourteen years."

The felony which appellant is alleged to have conspired to commit is defined by §2378, *supra*, and as applicable to this case is as follows: "Whoever, being \* \* \* entrusted with the administration of justice or prosecuting attorney, either before or after his election, qualification, appointment or employment, solicits

or accepts any such money, promise or valuable thing, to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment in any matter pending or that might legally come before him, shall, on conviction, be imprisoned in the state prison not less than two years nor more than fourteen years, fined not exceeding ten thousand dollars, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

This court has consistently held that an indictment, as here in question, to be good as against a motion to quash, must not only state facts showing the con-

1. spiracy, but also charge the felony with the same particularity as though the accused was to be tried for the felony alone. *Allen v. State* (1914), 183 Ind. 37, 45, 107 N. E. 471; *Green v. State* (1901), 157 Ind. 101, 60 N. E. 941; *Barnhart v. State* (1899), 154 Ind. 177, 56 N. E. 212; *Smith v. State* (1884), 93 Ind. 67; *Woodsmall v. State* (1913), 179 Ind. 697, 102 N. E. 130.

Our Criminal Code, §2065 Burns 1914, §194, Acts 1905 p. 584, specifies the grounds or reasons proper to be assigned in support of a motion to quash an

2. indictment or affidavit, and the specific objections pointed out by appellant are all covered by clauses 2 and 4 of that section, which provides that an indictment or affidavit must be held good unless upon its face it appears that the facts stated therein do not constitute a public offense, or that it does not state the offense with sufficient certainty. Along with these provisions, we must keep in mind §2063, cl. 10, Burns 1914, §192, Acts 1905 p. 584, which provides that no indictment shall be deemed invalid or quashed for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Also, §2062, cl. 5, Burns 1914, §192, Acts 1905 p. 584,

that an indictment will be deemed sufficient if "the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case."

The indictment before us covers twenty typewritten pages of the record, and in our opinion no good purpose will be subserved by copying it into this opinion. In substance, it charges that appellant, on May 1, 1914, was the duly appointed and acting deputy prosecuting attorney for Delaware county, and as such deputy had charge of all criminal prosecutions before justices of the peace, and the city court in the city of Muncie, Indiana; that said city is a city of the third class; that on and prior to May 1, 1914, there were in the city of Muncie more than twenty-five houses of ill fame resorted to for the unlawful purpose of prostitution and lewdness by persons, male and female, who were then and there of bad reputation for chastity and virtue; that there were more than twenty-five persons then and there in charge of, or keeping certain rooms in the city, then and there unlawfully used for the purpose of gambling and where gaming was permitted to be carried on; that there were then and there more than 100 places kept and operated by persons for the unlawful sale of intoxicating liquors; that more than 100 gaming and gambling devices of various kinds were then and there in unlawful operation in various places, and which were then and there unlawfully running and operated for the purpose of gaming and betting; that more than twenty houses of assignation were then and there unlawfully being run and operated by various persons in said city. That at the time the alleged offense is charged to have been committed, each and all of the persons jointly indicted with appellant were the duly elected or appointed, qualified and acting officers of said city, and the offices so held by



them were those of mayor, city police commissioners, chief of police and a city patrolman, that appellant and the other persons named in the indictment did then and there unite, combine, conspire and confederate with each other and in their official capacity to feloniously and corruptly ask, solicit and demand in person and by other persons, agents and employes who might be hired to act for them and each of them, money and other things of value as a bribe or bribes from each and all of the persons so engaged in the various classes of business heretofore named, or who might thereafter engage in such business or businesses, and, in consideration for the money or other things of value paid or contributed by such persons, they were, by such officers, to be shielded and protected from prosecution and permitted to run and operate their various kinds of business without molestation so long as they should or would pay a certain sum of money weekly to appellant or his coconspirators indicted with him; that, pursuant to said unlawful and felonious combination and conspiracy and in furtherance thereof, they and each of said conspirators personally and through others as go-betweens did solicit from the various persons so engaged in the various classes of business aforesaid, money and other things of value as bribes, and as a pecuniary reward for protection and freedom from arrest and raids on their places of business; that they (persons named in the indictment) did then and there feloniously as such officers receive bribes and pecuniary rewards of and from persons running and operating said various illegal business and immoral places, a large sum of money, to wit: \$10,000, for the purpose of influencing each and all of them with respect to his and their official action in any matter pending, or that might legally come before him or them; that thereafter the said persons as such officers did unlawfully, feloniously and corruptly refuse,

and would not prosecute, or cause to be prosecuted, any of the parties so as aforesaid paying them said bribe and bribes, but did then and there protect and defend them, and save them and their places from raids, and the said parties from arrest and punishment for the said numerous violations of the law; that the names of the persons from whom money and other things of value were to be solicited, or who were solicited and who contributed such bribes and rewards, were to the grand jury unknown.

Appellant insists that the facts stated in this indictment are not sufficient to constitute a public offense for the reasons: (1) That it fails to show knowledge on his part of any crime which he was to conceal, or in favor of which his official acts were to be performed; (2) that it fails to disclose the name or names of the person or persons who were to be allowed to commit the crimes or crime named therein, or the places where the alleged crimes were to be committed which were to be concealed by any of the defendants; (3) that there is no crime known to the law as a conspiracy to solicit bribes, and (4) that it fails to allege the ownership of the money, or other things of value to be solicited from the various unknown persons referred to therein.

Directing our attention to the alleged defects in the indictment relied on by appellant, and applying the various statutory provisions to which attention is

2. called, *supra*, it must be conceded that, unless such defects appear upon the face of the indictment, they are not raised by a motion to quash, or if they do appear, and the offense is charged with such certainty that such defects do not tend to the prejudice of his substantial rights, they must be disregarded. *Waggoner v. State* (1900), 155 Ind. 341, 58 N. E. 190, 80 Am. St. 237; *Selby v. State* (1903), 161 Ind. 667,

69 N. E. 463; *Padgett v. State* (1906), 167 Ind. 179, 78 N. E. 663.

The conspiracy here sought to be charged may be defined as a combination of two or more persons by some concerted action to accomplish an act or purpose

3. which by statute is defined to be a felony. 1

Bouvier, Law Dictionary (Rawle's 3d ed.) 621.

The indictment charges that more than 200 persons in the city of Muncie were engaged in running and operating places in that city in violation of the law. These places and the alleged violations are classified according to the character of the several alleged offenses. These allegations become important as they show an opportunity for the commission of the alleged crime. The indictment also charges that appellant and those indicted with him "did then and there feloniously and knowingly unite, combine, conspire and confederate together" to solicit bribes from persons engaged in the various businesses specifically mentioned in the indictment or who might thereafter be thus engaged. The two dominant elements of the crime here sought to be charged are a conspiracy and a felony. In this case the conspiracy entered into did not have reference to any particular named person as a victim, but it had to do with those guilty of certain named violations. In such cases it is unnecessary to allege that the conspirators knew at the time of forming the conspiracy of specific violations or the names of persons so actually engaged and from whom they would solicit bribes. The conspiracy was complete when the unlawful confederation was formed to do a thing which if committed is defined by our statutes as a felony. *Landringham v. State* (1874), 49 Ind. 186; Gillett, Crim. Law §310; *Eacock v. State* (1907), 169 Ind. 488, 82 N. E. 1039; Moore, Crim. Law, §653, p. 712.

Appellant, in support of his second insistence, seizes

upon the statement in the indictment, in substance, showing that \$10,000 in bribe money was actually

4. paid to, and received by, the conspirators. From this statement appellant draws the conclusion that the grand jury must have known some of the persons, if not all, who contributed this money, and the failure to allege these names was a fatal omission. In this connection we should consider the allegation that the conspiracy was formed to solicit bribes not only from violators of the law then in business, but from others who might thereafter engage in such business. It will be observed from the showing made that the agreement to solicit bribes contemplated, either directly or indirectly, an interview in some form with a large number of persons in the city of Muncie. In *McKee v. State* (1887), 111 Ind. 378, 12 N. E. 510, it is said: "The authorities abundantly settle the proposition that an indictment is not objectionable which charges that the object of the conspiracy is to defraud many persons, not capable of being resolved into individuals, or the public generally, instead of certain named individuals. 2 Bishop Crim. Law, section 209; 2 Wharton Crim. Law, section 1396." It does not necessarily follow, from the fact that money was actually paid, that the grand jurors knew the names of the persons contributing the same, or that the evidence before them on that subject was satisfactory. In such cases the general form of pleading has been recognized and sustained. *McKee v. State, supra*.

While the allegations relied on by appellant may be considered as showing overt acts done in pursuance of the conspiracy, which are not unusual in indict-

5. ments of this character, yet they are not essential. 4 Ency. Pl. and Pr. 716. By this ruling we are
6. not to be understood as holding that particularity in charging a crime is not required, for, generally

7. speaking, it is required. Consequently, in this case, if the names of the persons to be solicited

8. were known, or if they were reasonably ascertainable by the grand jury, they should have been pleaded. *McKee v. State, supra*; *Padgett v. State, supra*, 183. The rule requiring particularity in criminal pleading is to give identity and certainty to the transaction upon which the pleading is based, thereby enabling the accused to plead his conviction or acquittal in bar of another prosecution for the same offense. When this is done, the rule requiring particularity is satisfied. *Barnhart v. State, supra*, 178; *Fletcher v. State* (1909), 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A. (N. S.) 581. It is also equally well settled that where the names, as here, are unknown, the pleading may so state, and such statement will be regarded as a sufficient excuse for failing to name such persons. *Ashley v. State* (1884), 92 Ind. 559.

As to appellant's third contention, we cannot agree that it is not a crime for an officer such as a deputy prosecuting attorney to solicit bribes. As deputy

9. prosecuting attorney, it was his duty primarily to prosecute the criminal pleas of the state within his jurisdiction. He was an officer upon whom rested the duty, to the best of his ability, of using fair, honorable and lawful means to secure the conviction of all persons charged with crime in any of the courts of his judicial circuit within the jurisdiction of his appointment, and to that extent he was an officer intrusted with the administration of criminal justice. Being intrusted with the administration of justice, he is clearly within the provisions of the statute making it unlawful for him to solicit or receive bribes to influence his official action. So also were each and all the persons so jointly indicted with him by law charged with certain official duties pertaining to the enforcement of the criminal laws of the

state. It will not do to say that such persons, officers though they be, can only be charged and tried singly under the bribery statute, and not for the crime of conspiracy to commit the same felony. True, each of the persons named as officers, including appellant, performed a different duty, but, when taken together, they formed the machinery or at least controlled the criminal procedure required to bring violators of the law before the court.

With reference to the ownership of the money, etc., to be solicited, it is not directly alleged that such money,

bribes, etc., were the property of the persons to

10. be solicited. In this connection our attention is called to the case of *Green v. State*, *supra*, where it is stated: "In pleading a conspiracy to commit a felony, the elements of the intended felony must be fully disclosed, so that the court may see that a public offense is in fact charged." In that case the charge was a conspiracy to commit a felony, and the felony was blackmailing. "The gist of the felony defined as blackmailing is the extortion of money, chattels or valuable securities from a person by threatening to expose his crimes or immoralities." It was held, as blackmailing belonged to the same general class of crimes as larceny, embezzlement, robbery, burglary, or false pretenses, that the indictment must allege the ownership of the property or explain the absence of the averment. The reason assigned for this ruling is that one cannot "be guilty of larceny, nor of burglary, with respect to his own property of which he has the right of possession." In the case at bar, the gist of the alleged felony, defined by statute as bribery, is the soliciting of money or valuable thing by the deputy prosecuting attorney to influence him with respect to his official duty, or to influence his action in any matter pending, or that may legally come before him. *Glover v. State* (1887),

109 Ind. 391, 10 N. E. 282. A bribe is defined as “any gift, advantage, or emolument offered, given, or  
11. promised to, or asked or accepted by, any public officer to influence his behavior in his office.”

Standard Dictionary. The crime of bribery is a felony (§2378, *supra*), and is one against public justice. It has to do with a public officer, and pertains to his behavior in office. As we have seen, the word “bribe” has a well-defined, and likewise a well-understood, meaning, and, as in the statute and in this indictment used, precludes the thought that appellant had entered into a conspiracy to solicit from the persons described, money or other valuable thing, his own property, and of which he had the right of possession. Appellant as a public officer was charged with certain official duties for the performance of which the public generally was interested. The essential elements of this and the Green case are not alike. They are not properly in the same classification of crimes. The rule announced in that case, as to the necessity for pleading the ownership of the property, cannot be of controlling influence in determining the sufficiency of the pleading before us. For the reasons stated, we hold the indictment good, although it fails to allege the ownership of the money or other things of value to be solicited.

Appellant also asserts that the indictment shows that the bribes which were to have been solicited were collected, and therefore the alleged offense was

12. merged into the greater crime of bribery. We cannot agree to that proposition. “Where an indictment charges a conspiracy and also an overt act, which in itself is criminal, the conspiracy is not merged in the higher offense, where the defendant is placed on trial upon the charge of conspiracy only.” Such is the substance of the ruling in the case of *State v. Grant* (1892), 86 Iowa 216, 53 N. W. 120. See, also, *State v.*

*Madden* (1915), 170 Iowa 230, 148 N. W. 995. This rule is sound and we approve it.

Nor is the indictment bad for duplicity, for its language, when properly construed, refers to the persons running and operating various businesses char-

acterized as illegal, which are so classified as to bring them within the prohibition of our statutes pertaining to specifically defined crimes.

The fact that the bribe from each person was to be \$15 per week, taken in connection with the fact that the amount of the bribes to be solicited was unknown to the grand jury, appears to be contradictory, yet each of these statements is in keeping with the ultimate fact—soliciting bribes. They pertain to and are part and parcel of a single scheme.

Appellant also urges for our consideration that the indictment does not state the offense with sufficient certainty. The indictment is clearly sufficient, not

only to enable the court and jury to understand distinctly the issue to be tried, but it also fully informs the defendant of the nature of the offense preferred against him. Nor do we find any defects or imperfections in the indictment which would tend to the prejudice of the substantial rights of appellant; and a judgment may well be pronounced upon a conviction according to the rights of the case. These facts appearing, the indictment must be held sufficient to withstand a motion to quash on the ground of uncertainty. No more is required. *Skelton v. State* (1909), 173 Ind. 462, 89 N. E. 860, 90 N. E. 897; *Terre Haute Brewing Co. v. State* (1907), 169 Ind. 242, 82 N. E. 81; *State v. Feagans* (1897), 148 Ind. 621, 48 N. E. 225; *Funk v. State* (1897), 149 Ind. 338, 49 N. E. 266.

Appellant also insists that the trial court erred in sustaining appellee's demurrer to each of the nine paragraphs of his plea in abatement. The first six of



15. these may be considered together as they each rely upon the same state of facts. Each paragraph is directed to an individual juror and together challenge the competency of the entire panel. Appellant was not under prosecution for any offense at the time the grand jury was impaneled, and by his plea he tenders the cause for challenge provided by clause 7, §1965 Burns 1914, §97, Acts 1905 p. 584. That statute provides that: "A person held to answer a charge for a felony or misdemeanor may challenge an individual grand juror before the jury is sworn, for one or more of the following causes only: \* \* \* Seventh, that such a state of mind exists on his part in reference to the party charged that he cannot act impartially and without prejudice to the substantial rights of the challenger." It will be noticed that this section specifically provides that the cause for challenge therein mentioned is to be exercised before the jury is sworn. We have no statute making any provision for the challenge of an individual grand juror or to the array by a person called to plead to an indictment. However, such practice has been allowed and approved in this state in a proper case. *Stipp v. State* (1917), 187 Ind. 211, 118 N. E. 818. But no case will be found in this jurisdiction where the rule has been extended to permit the indicted to thus challenge for favor, which is the basis of appellant's plea. Our statute has fixed the qualifications of both a grand and a petit juror, and provides that such juror must be a resident voter of the county, and a freeholder or householder. Acts 1917 p. 688, §1674 Burns 1914, §1393 R. S. 1881. Appellant does not rest his plea on either of these statutory qualifications or on facts going to the organization of the grand jury, but on bias and prejudice, and therefore the question: May appellant, after indictment, challenge a juror for this cause by a plea in abatement? This question was be-

fore the court in the case of *State v. Hamlin* (1879), 47 Conn. 95, 36 Am. Rep. 54, and in a well-considered opinion, and, after reviewing all the adjudicated cases in this country up to that time, that court held that all the authorities were agreed "that objections to grand jurors on the ground that they have formed and expressed opinions of the guilt of a person accused of crime, before they were impaneled and sworn, cannot be pleaded in abatement to the indictment." Upon an exhaustive examination of the authorities bearing upon the question being considered, we hold that the grounds for challenge presented by appellant in the first six paragraphs of his plea in abatement are unavailing after indictment. *State v. Easter* (1876), 30 Ohio St. 542, 27 Am. Rep. 478; *People v. Borgstrom* (1904), 178 N. Y. 254, 70 N. E. 780; *Lee v. State* (1882), 69 Ga. 705; *Jackson v. United States* (1900), 102 Fed. 473, 42 C. C. A. 452; *Patrick v. State* (1884), 16 Neb. 330, 20 N. W. 121; *State v. Rickey* (1828), 10 N. J. Law 97; 4 Ann. Cas. 873, note; Thompson and Merriam, *Juries* §533; Joyce, *Indictments* §85; 20 Cyc 1300; 12 R. C. L. 1030, §17. Grand juries as a rule do not know who will be accused before them, and to open the door for the indicted to challenge on the ground of prejudice entertained by a juror against him or his business would lead to endless delays, as well as the possibility of having a new grand jury for every crime committed. 12 R. C. L. 1022, §9.

The rulings of the court in sustaining a demurrer to the seventh and ninth paragraphs of appellant's plea in abatement, and in sustaining appellee's motion to strike out the tenth paragraph, are not questioned. The eighth paragraph remains to be considered. The only part of this paragraph at all important, and on which our decision rests, reads as follows: "That one William A. Thompson, an attorney employed to procure this in-

dictment and to prosecute this defendant \* \* \* was present with the grand jury which found this indictment, during the examination of evidence, and during their deliberations in this case, for the purpose of securing this indictment against this defendant, to which this plea is pleaded; and *being so present with said grand jury after all the evidence had been submitted, and at and before the finding of said indictment, he, the said William A. Thompson did then and there counsel, request and urge the said grand jury upon the testimony before them to find this indictment, and did procure the said grand jury to find and return said indictment.*" (Our italics.)

Appellant to support the sufficiency of this paragraph insists: (1) That the circuit court had no power to appoint a special prosecutor in this case for the reason, as the plea also shows, that J. Frank Mann was the duly elected and acting prosecuting attorney, and at that time was in attendance upon the court and upon the grand jury which found this indictment; that Thompson was not a deputy prosecuting attorney, nor a witness before the grand jury, nor a stenographer employed by the grand jury; and (2) that the paragraph is good for the reason that it shows that after all the evidence had been submitted Thompson participated in the deliberations of the grand jury, and at and before the finding of said indictment "did then and there counsel, request and urge said grand jury upon the testimony before them to find this indictment," which acts on the part of Thompson were prohibited by §1980 Burns 1914, Acts 1905 p. 584, §109.

In passing, we may remark that the demurrer admits all the facts of the plea well pleaded, but, as this plea does not deny the merits of the prosecution and

16. only tends to delay the remedy, it will be upheld only after strict construction, and, unaided by

any intendment or presumption of law or fact,  
17. it is found to be certain and conclusive against such supposable matter as can properly be replied. *State v. Comer* (1901), 157 Ind. 611, 62 N. E. 452; *Melville v. State* (1909), 173 Ind. 352, 358, 89 N. E. 490, 90 N. E. 467; *State v. Cooper* (1884), 96 Ind. 331; *Hardin v. State* (1864), 22 Ind. 347; *C. Callahan Co. v. Wall Rice, etc., Co.* (1909), 44 Ind. App. 372, 89 N. E. 418.

As to appellant's first contention, the plea fails to state that Thompson was not appointed specially by the court to assist the prosecuting attorney before  
18. the grand jury, and in the preparation of the indictment. This plea goes to the indictment, and in determining its sufficiency we may look to the  
19. indictment, and from which it will be seen that the appellant in this case was a deputy of Mann, the regular prosecuting attorney then in office, and who according to this plea was not responsible for Thompson's appointment. The nature and scope of the investigation then before the grand jury called for the aid and unbiased assistance from the prosecuting attorney's office. In the absence of a showing to the contrary, it is not unreasonable to assume that that office was friendly to its deputy. While there is no appearance of wrongdoing by the prosecuting attorney, yet it does not appear that he or his office was not under investigation. The facts before the court at the time the special prosecuting attorney was appointed are not before us, and, in the absence of a contrary showing the presumption in favor of the regularity of the proceedings of the trial court must prevail. True, we have no statute expressly authorizing the appointment of a special prosecuting attorney to appear before the grand jury, or to assist the prosecuting attorney in the trial of criminal causes, yet this court has recognized the in-

herent power and duty of courts having general jurisdiction of criminal matters to appoint attorneys to assist the prosecutor in the trial of criminal cases. *Tull v. State, ex rel.* (1884), 99 Ind. 238; *Wood v. State* (1883), 92 Ind. 269. This court, in *Board, etc. v. McGregor* (1908), 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333, while recognizing the expediency and desirability of the state having such assistance in important and difficult criminal causes, was impressed with the view that the duty of providing for such emergencies rests primarily with the legislature; however, the inherent power of the court to make such appointments was recognized, and we still adhere to the doctrine that the question is one for the sound discretion of the trial court. *Dukes v. State* (1858), 11 Ind. 557, 71 Am. Dec. 370; *State, ex rel. v. Ellis* (1915), 184 Ind. 307, 112 N. E. 98; *People v. Northup* (1914), 184 Ill. App. 638, 646. The allegations of this paragraph in this particular are not sufficient to overcome the presumptions which may properly be indulged against it.

Appellant's second insistence presents a more troublesome question. If the alleged facts could reasonably be considered as showing a mere irregularity, and

20. not calculated to injure the persons indicted, we would not hesitate to declare the paragraph in question insufficient. In this particular it cannot be said that the special prosecutor was vested with more authority or greater privileges than the regular prosecuting attorney. Conceding that he had the same rights, privileges and authority in the particular case, it follows that the sphere of his action is circumscribed by the statutory provisions applicable to regular prosecuting attorneys. By §9406 Burns 1914, §5864 R. S. 1881, it is made the duty of prosecuting attorneys within their respective jurisdictions to conduct all prosecutions for felonies or misdemeanors. By §1980, *supra*: "The

prosecuting attorney or his deputy shall be allowed at all times to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by it, or advice upon any legal matter when required; and he may interrogate witnesses before the grand jury, when the jury or he deem it necessary, *but no prosecuting attorney, officer or persons shall be present with the grand jury during the expression of their opinions or in giving their votes upon any matter before them.*" (Our italics.) By this section it was the purpose of the legislature to exclude all persons from the presence of the grand jury during the expression of their opinions or in giving their votes, and for the obvious purpose not only to prevent the abuse of official privilege, but to leave the grand jurors free to act upon their own impressions of the evidence and law as to all matters finally submitted to them, uninfluenced by the presence or suggestions of any other person.

Appellant claims the protection of this statute, and shows that after all the evidence had been submitted, and at and before the finding of said indictment

20. Thompson did then and there counsel, request and urge the grand jury upon the testimony before them to find this indictment, and did procure the said grand jury to find and return the same. In other words, this language can mean nothing more nor less than that Thompson was present and actively insisting that appellant be indicted "upon the testimony before them." It would be a forced and unauthorized construction of the language as set forth in this plea to say that Thompson's activities occurred only during the time of investigating the charge, and prior to the time when the grand jury expressed their opinions or gave their votes, but such must be the construction if this case is to be ruled by the case of *State v. Bates* (1897), 148 Ind. 610, 612, 48 N. E. 2.

The case of *Shattuck v. State* (1858), 11 Ind. 473, which was based upon the common-law practice, is cited in support of the rule in the *Bates* case. A careful reading of the *Shattuck* case will disclose that the plea then under consideration was obscurely worded. In other words the court was not able to see from the wording thereof that the "discussion" before the grand jury by the prosecutor's assistants amounted to more than advice on questions of law, and it not certainly appearing that such assistants took part during the time the grand jurors were expressing their opinions or giving their votes, improper action was not shown; and as right action should be presumed, the plea was held insufficient. But it was held that the mere presence of such assistants at any time would not *per se* invalidate the finding. The soundness of this latter ruling has been questioned on the ground that the mere presence of such officer at the time of finding the indictment would seem to be an abuse of their official privilege. Thompson and Merriam, *Juries* §632. In this state, since 1881, the question of the presence of the prosecuting attorney before the grand jury has been controlled by statutory enactment. §1668 R. S. 1881. Prior to that time the common-law practice in this particular prevailed. We may assume that the legislature was advised as to the ruling in the *Shattuck* case, and its tendency to open the door to the grand jury room at a time when it should be closed, and, thus advised, it passed this statute to prevent any opportunity for suggestions or influences upon the grand jurors by mere presence of the prosecuting attorney during the prohibited period. *Commonwealth v. Berry* (1906), 29 Ky. Law 234; *Lewis v. Board, etc.* (1876), 74 N. C. 194. However, the plea now under consideration goes farther than mere presence. It charges affirmative activities of the special prosecutor in procuring the indict-

ment not only before, but at the time of finding the indictment, and upon the testimony before the grand jury. This action is condemned in the Shattuck case, wherein it is said that: "The advice given by the court, or prosecutor, could not legitimately be upon questions of fact, but was confined to questions of law; that is, neither could say to the jury that the facts were sufficient to authorize them to find a bill, no more than the judge should say to the petit jury, upon the trial, that they should return a verdict of guilty. In the one case, the inquiry is upon the question of 'a true bill' or not a true bill, and in the other, a trial of the question of 'guilty' or 'not guilty.'" In *People v. Bright* (1910), 157 Cal. 663, 109 Pac. 33, the court had before it §925 of the Penal Code of that state, which has reference to who may be present during the session of the grand jury, and provides that: "No person must be permitted to be present during the expression of their opinions, or giving their votes upon any matter before them." In that case that statute was construed to mean that no one was permitted to be present with the grand jurors during their deliberation and voting; that the expression in the Code, "during the expression of their opinions," means the deliberation of the grand jurors subsequently to investigation, and includes all the period after the evidence has been received, to and including the time of voting on the indictment. Section 285 Revised Laws of Minnesota, 1905, provides: "That no county attorney, sheriff, or other person, except the grand jurors, shall be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them." In *State v. Slocum* (1910), 111 Minn. 328, 126 N. W. 1096, the Supreme Court construed this section to mean that the county attorney's presence is limited to the examination of witnesses. In



*Miller v. State* (1900), 42 Fla. 266, 28 South. 208, it appears that counsel was before the grand jury and was present during their investigation and deliberations and at the time of voting on the bill, "and being so present before said indictment was found, he did at such time *urge and request* the grand jury to find such indictment." (Our italics.) Sections 1780 and 3856 Florida Comp. Laws 1914, provide that the state's attorney, whenever required by the grand jury, shall attend them for the purpose of examining witnesses or giving advice on legal matters. The court, after referring to these sections, said: "The statute does not contemplate that such counsel may advise the grand jury to find bills upon the testimony before them. \* \* \* To urge and request a grand jury to find a particular bill after examination of evidence in the case includes the view that the attorney so urging and requesting is of the opinion that the evidence justifies such conclusion, and this is clearly beyond the province of such attorney." In *Stuart v. State* (1896), 35 Tex. Cr. 440, 34 S. W. 118, it is said: "We apprehend that 'discussing the propriety of finding a bill of indictment,' and 'deliberating upon the accusation against the defendant,' mean the same thing. Mr. Webster defines 'deliberating' as the 'act of weighing and examining the reasons for and against a choice of measures; careful discussion and examinations of the reasons for and against a proposition.'"

In the case at bar it appears that the special prosecutor was present with the grand jury at a time prohibited by statute. This being true, he was there during such time as an unauthorized person, and his personal presence will be considered harmful, and it will not be necessary for the court to inquire as to the effect of his conduct. From our investigation of the authorities, we conclude that the great weight is upon the side that there must be no opportunity for im-

proper influences upon the grand jury after the investigation is closed. *United States v. Edgerton* (1897), 80 Fed. 374; *United States v. Rubin* (1914), 218 Fed. 245; *Rothschild v. State* (1880), 7 Tex. App. 519; *United States v. Heinze* (1910), 177 Fed. 770; *Latham v. United States* (1915), 226 Fed. 420, 141 C. C. A. 250, L. R. A. 1916D 1118; *Wilson v. State* (1893), 70 Miss. 595, 13 South. 225, 35 Am. St. 664; *United States v. Philadelphia, etc., R. Co.* (1915), 221 Fed. 683; *Thompson and Merriman*, *Juries* §634; 2 *Wharton*, *Crim. Proc.* (10th ed.) §1295; 16 *Col. Law Review* 158; *Clark*, *Crim. Proc.* 113.

It cannot be said that the pleader is here relying upon conclusions and has failed to allege facts, in that he has not set forth what was said and done by the special prosecutor in the way of influencing the jury. The words "counsel, request and urge" as used in this plea, have a well-defined and understood meaning, so that, as here used, they were sufficient to inform the court that Thompson had advised the grand jurors as to their duty upon the testimony before them and of his desire that they find this indictment. This action on the part of the special prosecutor was improper, and the trial court erred in sustaining appellee's demurrer to the eighth paragraph of appellant's plea in abatement.

Judgment reversed, with instructions to grant a new trial and overrule appellee's demurrer to the eighth paragraph of appellant's plea in abatement, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 123 N. E. 209. Conspiracy: sufficiency of indictment as to object of and means of accomplishing crime, 21 *Ann. Cas.* 34. Validity of acts of deputy or special prosecuting attorney, *Ann. Cas.* 1918A 718. Presence of court officer in grand jury room as vitiating indictment, *Ann. Cas.* 1912D 978. See under (4, 8) 22 *Cyc* 348, 12 *C. J.* 614 (7) 22 *Cyc* 295.

## LAWLER ET AL. v. BEAR ET AL.

[No. 23,482. Filed April 1, 1919. Rehearing denied May 14, 1919.]

1. *APPEAL.—Review.—Finding Against Appellee.—Absence of Cross-Errors.*—Where the finding was against the plaintiff appellee on the first paragraph of complaint, and no cross-errors are assigned, such paragraph need not be further considered on appeal. p. 310.
2. *APPEAL.—Overruling Demurrer.—Waiver.*—Where the appellant failed to set out in his brief a copy, or the substance, of a demurrer, or to amend the brief after the defect had been pointed out by the appellee, the alleged error in overruling a demurrer to the complaint is waived. p. 311.
3. *APPEAL.—Grounds for New Trial.—Review.*—That the decision is not sustained by sufficient evidence, assigned as a ground for new trial, presents no question for review on appeal, in the absence of the evidence from the record. p. 311.
4. *TRIAL.—Verdict.—Validity.*—A verdict is contrary to law when it is contrary to the principles of law as applied to the facts which the jury is called upon to try. p. 312.
5. *DOWER.—Wife's Inchoate Interest.—Priority.*—Although money advanced by the guardian of an insane husband pursuant to orders of the court was paid mostly to the wife on certain oral statements and promises by her, and was used for her and the children's support, and for taxes, repairs, and insurance on the ward's realty upon which the wife and children resided, the guardian could not, in view of §3037 Burns 1914, §2499 R. S. 1881, acquire a lien on the realty that would supersede or displace the wife's inchoate interest in the ward's realty. pp. 312, 313.
6. *DOWER.—Wife's Inchoate Interest.—Vesting.—Judicial Sale.*—Under §3052 Burns 1914, §2508 R. S. 1881, the inchoate interest of the wife in her husband's realty becomes an absolute vested interest whenever the husband's title therein vests absolutely in the purchaser at judicial sale. p. 313.
7. *DOWER.—Wife's Inchoate Interest.—Vesting.—Judicial Sale.*—Where the land of an insane husband is sold under order of the court, the wife's inchoate interest therein becomes vested as an absolute interest under §3052 Burns 1914, §2499 R. S. 1881. p. 313.
8. *DOWER.—Liens on Land.—Power of Guardian to Create.*—The guardian of an insane husband has no power by his act or conveyance to extinguish or encumber the inchoate interest of the wife in such husband's realty. p. 313.

From the Jefferson Circuit Court; *Francis M. Griffith*, Judge.

Action by Solomon J. Bear, receiver, and others against Cora Lawler and another. From a judgment for the plaintiffs, the defendants appeal. *Reversed.*

*A. J. Shelby* and *Ira M. Sharp*, for appellants.

*M. R. Sulzer*, for appellees.

LAIRY, J.—As disclosed by the briefs filed on behalf of appellants and appellees, there is no dispute as to the facts upon which the finding and judgment of the trial court is based. The facts thus disclosed show that in June, 1913, Joseph Lawler was adjudged to be a person of unsound mind, and that the People's Trust Company was appointed as his guardian, in which capacity it continued to act until the death of said Joseph Lawler in February, 1917. At the time of the appointment of the guardian and at the time of his death, Joseph Lawler was the owner of 160 acres of farm land in Jefferson county, Indiana, on which his wife and minor children resided. In pursuance of orders made by the court appointing it, said guardian advanced to the estate of its ward sums of money amounting in all to about \$1,000, which, together with interest to the time of trial, amounted to \$1,056.20. On behalf of the guardian, it is stated that the money so advanced was paid mostly to Cora Lawler, the wife of its ward, on certain statements, and promises made by her as to its repayment, and that it was used for the payment of taxes on the real estate of the ward, for repairs and insurance on the buildings, and for the support of the wife and minor children of the ward. After the death of Joseph Lawler, one George W. Pheasant was appointed as administrator of his estate, and in March, 1917, he filed a petition as such administrator showing that the personal estate of Joseph Lawler, deceased, was not sufficient to pay the

debts of his estate, and asking that the real estate be partitioned with the widow and her share set off to her and the remaining two-thirds be ordered sold to pay the debts of the estate. On this petition such proceedings were had as resulted in a partition of the land, and forty acres thereof were set off to appellant, Cora Lawler, as widow, and the remainder was ordered sold to pay debts. The sale was made by the administrator in pursuance of notice in May, 1917, and the real estate sold was purchased by Cora Lawler and Hayden Lawler, one of the heirs. On April 23, 1917, appellee Bear was appointed receiver of the People's Trust Company, and on July 2, 1917, he brought this action as such receiver.

The complaint was in two paragraphs. The first paragraph proceeded on the theory that the sale of the real estate by the administrator should be vacated

1. and that the real estate should be re-exposed for sale, on the ground that the bidding at the sale was chilled by representations and statements made by defendants Cora Lawler and Hayden Lawler, who became the purchasers at such sale, and on the further ground that the sum for which it sold was greatly disproportionate to its real value, and that if resold it would bring an amount in excess of the price for which it sold of at least ten per cent., exclusive of cost. §2875 Burns 1914, §2358 R. S. 1881. The finding was against appellee on the first paragraph, and, as there are no cross-errors assigned, this paragraph need not be further considered.

As disclosing the theory of the second paragraph, the statement of appellee in his brief may be adopted: "The theory of the second paragraph of complaint and upon which the cause was tried and decision rendered in the lower court was that appellee, receiver of People's Trust Co., had a lien and was entitled to be reimbursed

from the estate of said Lawler (insane) deceased, on account of the advancement made by said guardian for the payment of taxes, insurance, repairs and the support and maintenance of his wife, Cora Lawler, and minor son, Hayden Lawler, and on account of the representation and agreements made by the said Cora Lawler to the said guardian and court."

The court found for the plaintiff and entered a decree declaring a lien in its favor on all of the real estate of which Joseph Lawler died seized, for the amount of the advancement and accrued interest.

The action of the court in overruling appellants' demurrer addressed to the first and second paragraphs of complaint is assigned as error. The brief of

2. appellants on the assignment of errors does not set out a copy of the demurrer or give its substance; and, although this defect in the brief was pointed out in the brief of appellee Bear, no attempt was made to amend the brief on assignment of error in this particular. For the reason stated, the alleged error is waived.

The motion of appellants for a new trial, which was overruled, was based on the grounds that the decision of the court was not sustained by sufficient evi-

3. dence, and that it was contrary to law. As the evidence is not in the record, the first ground upon which this motion is based cannot be considered.

It thus appears that all questions which the assignment of errors seeks to present are eliminated except one, and that is, Does the record affirmatively show that the decision of the court is contrary to law? If it does, such decision cannot stand, and the judgment based thereon must be reversed.

In the case of *Equitable Accident Ins. Co. v. Stout* (1893), 135 Ind. 444, 33 N. E. 623, this court said: "A verdict is contrary to law when it is contrary to

4. the principles of law as applied to the facts which the jury is called upon to try; when it is contrary to the law which should govern the cause."

To find as it did in this case, the court must have determined as a matter of law that, under the facts shown, appellee as receiver was entitled to an equitable

5. lien on the real estate of which Joseph Lawler was seized during the guardianship and at the time of his death, and that such lien covered the inchoate interest of Cora Lawler as the wife of the ward, or that it was superior to such inchoate interest of the wife.

We need not and do not decide whether, under the facts of this case, the guardian was entitled to a lien for all or for any part of the money advanced, and it may be that, in the absence of the evidence from the record, this court could not properly consider that question. This court can, however, determine the nature and extent of such a lien, in case it existed, and this is true irrespective of the evidence, as no evidence which could have been introduced could affect the status of the lien with respect to the inchoate interest of the wife.

Section 3037 Burns 1914, §2499 R. S. 1881, provides: "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

Section 3052 Burns 1914, §2508 R. S. 1881, provides that in all judicial sales of real estate in which a married woman has an inchoate interest by virtue of

6. her marriage, where such inchoate interest is not directed by the judgment to be sold or barred, such interest shall become absolute and vest in the wife in the same manner and to the same extent as the inchoate interest of a wife vests upon the death of her husband. The inchoate interest of the wife under this statute becomes an absolute vested interest, whenever the title of the husband vests absolutely in the purchaser at judicial sale, after which time the wife may have her interest set off to her by partition.

Under these statutes it has been held that the inchoate interest of a wife in her husband's lands cannot be divested by sale on foreclosure of a lien for street improvements. *Darby v. Vinnedge* (1913), 53 Ind. App. 525, 533, 100 N. E. 862.

If land of an insane husband is sold under an order of court, the inchoate interest of the wife becomes vested as an absolute interest under §3052, *supra*. *Huff-*

7. *man v. Huffman* (1912), 51 Ind. App. 330, 335, 99 N. E. 769; *Sell v. Keiser* (1911), 49 Ind. App. 101, 96 N. E. 812.

Under the law, the guardian of an insane ward has no power to create or to acquire a lien on the lands of his ward which would have the effect to supersede or

5. displace the inchoate interest of the wife in the lands of such ward. If, instead of advancing the money, the guardian, in pursuance of an order of  
8. court, had borrowed it and had executed a mortgage on the ward's land to secure the payment, the lien of such mortgage would not have affected the inchoate interest of the wife. Likewise a lien on the ward's real estate declared by the court before his death in favor of his guardian as security for money advanced could not have been enforced against the inchoate interest of the wife of the ward. No act performed or conveyance executed by the husband can prejudice or ex-



tinguish the rights of the wife to her third of his lands. §3037 Burns 1914, *supra*. The guardian of an insane husband, as his representative, has no more power by his act or conveyances to extinguish or incumber the inchoate interest of the wife in her husband's real estate than the husband would have if sane.

The assent of the wife to conveyances or other instruments which would operate as a conveyance or incumbrance of her husband's real estate must be evidenced by her acknowledgment thereof in the manner provided by law. §3037 Burns 1914, *supra*. No mere oral promise, statement, or representation made by the wife could amount to such an assent.

The finding of the trial court is contrary to law. This case belongs to that class to which Judge Elliott refers in his Appellate Procedure, §487, "wherein the trial court proceeds upon an erroneous theory which is carried to a judgment affecting the interests of all the parties to the suit or action. In such a case, the whole judgment or decree must be reversed in order that complete justice may be done."

The judgment is reversed, with instructions to the court below to sustain appellants' motion for a new trial.

NOTE.—Reported in 122 N. E. 660. Dower: sale of land for taxes as defeating inchoate interest of wife, 19 Ann. Cas. 977, Ann. Cas. 1914C 115. See under (5-8) 14 Cyc. 928, 929.

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### FAUVRE COAL COMPANY v. KUSHNER.

[No. 23,299. Filed May 27, 1919.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Employers' Liability Act.*—Section 2 of the Employers' Liability Act (Acts 1911 p. 145, §8020b Burns 1914) makes no distinction between general and special orders; hence, in a servant's action for injuries alleged to have resulted from an order, etc., it is not necessary to allege whether the order was general or special. p. 322.

2. **PLEADING.—Definiteness.**—In a miner's action for injuries, an allegation that the plaintiff was, by instructions of the defendant, sitting on a car loaded with dirt while driving down a mine entry, was a direct averment of the fact that the defendant had instructed the plaintiff to sit on such car while driving down the entry. p. 323.
3. **PLEADING.—Motion to Make More Specific.**—Where a motion to make the complaint more specific might properly be sustained, it is not error to overrule it if the pleading is sufficiently specific to make apparent the precise nature of the charge that the defendant is called upon to meet and defend. p. 323.
4. **PLEADING.—Conclusions.—Waiver of Objection.**—If no motion is made to require a party filing a pleading to state the facts necessary to sustain conclusions alleged, all objections to the pleading of such conclusions are waived, in view of §343a Burns 1914, Acts 1913 p. 850. p. 324.
5. **PLEADING.—Construction.—Inferences.—Demurrer.**—A complaint to which a demurrer has been filed will be deemed sufficient whenever the necessary allegations, even though stated illogically and by way of argument, can be fairly gathered from it, and all facts will be deemed stated that can be implied from the allegations made by fair and reasonable intendment, and will be given the same force as if directly stated. p. 325.
6. **PLEADING.—Positiveness.—Participial Phrases.**—The rule requiring every material fact to be positively and directly alleged has been relaxed, and a fact pleaded by means of participial phrases will be given the same force and effect as though directly stated. p. 325.
7. **MASTER AND SERVANT.—Action for Injuries.—Complaint.**—A servant's complaint for injuries is not insufficient on demurrer merely on the ground that certain material facts are not directly averred and that their existence is left to inference. p. 325.
8. **NEGLIGENCE.—Jury Question.**—Where the facts set out in a servant's complaint for injuries are reasonably susceptible to more than one inference or conclusion as to the existence of negligence or contributory negligence, the question is for the jury. p. 325.
9. **MASTER AND SERVANT.—Action for Injuries.—Complaint.**—A servant's complaint for injuries need not specifically allege that a duty was owing from the master, where the facts pleaded are sufficient to warrant an inference of such fact. p. 326.
10. **MASTER AND SERVANT.—Action for Injuries.—Complaint.**—A

servant's complaint showing that the defendant owed the plaintiff a duty and containing a general charge of negligent failure to discharge such duty which resulted in the injury complained of is sufficient to withstand a demurrer. p. 326.

11. **APPEAL.—Bill of Exceptions.—Filing.**—Where a record fails to show a compliance with §661 Burns 1914, Acts 1911 p. 193, relative to the extension of time for the filing of a bill of exceptions, but shows that the statute was ignored, an order extending the time therefor was void, and a bill of exceptions filed during the extended time is not in the record. p. 327.
12. **APPEAL.—Matters Reviewable.—Instructions.**—An objection that the court erred in giving certain instructions because they were not applicable to the evidence and because they assumed certain facts to be true, where there was conflict in the evidence, presents no question for review in the absence of the evidence from the record. p. 328.

From Vigo Circuit Court; *Samuel D. Royse*, Special Judge.

Action by John Kushner, by his next friend, against the Fauvre Coal Company. From a judgment for the plaintiff, the defendant appeals. (Transferred from the Appellate Court under Acts 1901 p. 590, §1405 Burns 1914.) *Affirmed.*

*Royse, Dix & Cooper*, for appellant.

*Charles S. Batt and Walter S. Danner*, for appellee.

**WILLOUGHBY, J.**—This was an action by appellee against appellant to recover damages for personal injuries alleged to have been received by appellee while he was working in appellant's coal mine. The complaint counts on a liability under the Employers' Liability Act of March 2, 1911, and is in one paragraph.

The appellant filed a motion to require the plaintiff to make his complaint more specific and more definite and certain, and also filed a demurrer alleging that said complaint did not state facts sufficient to constitute a cause of action against defendant. Both of these were overruled, and the appellant then filed an answer in general denial to the complaint and the cause was sub-

mitted to a jury, resulting in a verdict for appellee in the sum of \$3,000, on which judgment was rendered; and from such judgment appellant appeals. The errors relied on for reversal are: (1) The court erred in overruling the motion of appellant to require the appellee to make the amended second paragraph of complaint (his complaint herein) more specific and more definite and certain. (2) The court erred in overruling appellant's demurrer to the amended second paragraph of complaint. (3) The court erred in overruling appellant's motion for a new trial.

The complaint alleges: That the plaintiff is an infant under the age of twenty-one years; that the defendant is now and was on and for a long time prior to December 2, 1912, a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and is engaged in business, trade and commerce in Vigo county, State of Indiana, and did on and before December 2, 1912, and does now, employ more than five men; that the defendant is engaged in mining and selling coal, and has a mine located in Vigo county, Indiana, known as Ice Plant Mine No. 2; that plaintiff, on December 2, 1912, was a driver for the defendant in its said mine, and as such driver he was employed by defendant to drive in, along and through various entries of its said mine, among which was an entry in defendant's mine known as the "main east entry"; that the defendant now has, and for a long time prior to December 2, 1912, had, a shaft sunk from the surface of the earth to the bed of the coal beneath—a distance of some 200 feet—and at the bottom of said shaft had entries leading out from the shaft, and cross-entries leading from the main entries, and rooms turned off from the main and cross-entries; that leading off from the bottom of said shaft was one entry known as the main east entry; and that on said main east entry the defendant for a long time

prior to December 2, 1912, had tracks laid on said main east entry, composed of iron rails placed on wooden cross-ties, and over said tracks cars were drawn by means of mules up to the switch known as the "double parting" in said main east entry, from which double parting the cars were hauled on said main east entry to the bottom of the shaft, to be hoisted through the shaft to the surface of the earth. Plaintiff further avers that he had, prior to December 2, 1912, been employed as a coal digger, and was employed in room 7, turned off \_\_\_\_\_ entry, turned off \_\_\_\_\_ entry; that the defendant had in its employ William Brown, who was the mine boss in charge of the defendant's said mine, said Brown having full charge of said mine, and full authority to hire and discharge all the employees in said mine, including this plaintiff, and he had charge of the work, machinery, and the placing and disposing of, hiring and discharging employees therein; that on December 2, 1912, the said William Brown, mine boss of defendant as aforesaid, instructed this plaintiff to drive a mule in the hauling of coal, dirt, rock and slate from the various parts of the mine to the bottom of said shaft, and that among the entries he had to travel in the work assigned to him by the said mine boss was the said main east entry, and that he did travel through the said main east entry in the performance of his work, and doing the duties assigned to him by the said mine boss, Brown, as aforesaid; that on December 2, 1912, plaintiff was under the direction of the defendant, through its said mine boss, Brown, as aforesaid, hauling a carload of dirt through the said main east entry; that attached to said car was a mule, which this plaintiff was driving for the purpose of hauling said car of dirt as he was instructed to do by the said defendant; that the top of said car which he was driving as aforesaid extended up to within about one foot of the roof of

said main east entry. And plaintiff avers that in driving down said main east entry he was, in accordance with the custom, rules and usage obtaining and existing in defendant's mine, and with the knowledge and consent of defendant, and by the instructions of defendant, sitting on said car of dirt, and that it was necessary for him to bend his body forward so as to prevent it from being struck by coming in contact with the roof, which roof was about one foot above the car as aforesaid. Plaintiff further avers that as he was driving down said main east entry as aforesaid, and under said roof, at a point about — feet from the bottom of the shaft, a large boulder was carelessly and negligently suffered and permitted, and for a long time had been suffered and permitted, to project out and down from the roof for a distance of some six inches, and it thus and thereby came in contact with and jammed against plaintiff's shoulders, injuring him as herein-after described. That said boulder had for a long time prior to December 2, 1912, carelessly and negligently been suffered and permitted to project out and down from the roof, and had by the defendant been carelessly and negligently permitted to thus be and to thus remain in said roof, although it was likely to injure this plaintiff or anyone else driving through the mine, while riding upon a mine car, in the usual course of their work; that the said main east entry was used by the employees of defendant in driving through said entry during various times every working day, in the discharge of the defendant's business; and plaintiff avers that said stone carelessly and negligently projecting out and down from the said roof of the said main east entry as aforesaid did strike this plaintiff's left shoulder and the top of his back, and the said car in which the plaintiff was riding was moving forward rapidly at said time, and the said projecting stone did wedge this plaintiff

down against and onto the said car in which he was riding, and did so firmly wedge this plaintiff between the said projecting stone and the said car that it stopped the said car, and the mule attached to said car continued to pull forward, but was unable to move said car on account of the plaintiff being wedged in between the top of said car and the said projecting stone from the roof as aforesaid; that the mule, in pulling forward, did further mash this plaintiff so that he was thrown off to the side of the car in an unconscious condition, and remained unconscious for more than one hour, and further injuring this plaintiff by causing a curvature of the dorsal vertebrae of the spine of this plaintiff, and of the sixth, seventh, eighth, ninth, tenth and eleventh dorsal vertebrae; and did jam and injure the entire back and spine and the back of both shoulders of the plaintiff, and did bruise the top and the back of his head, and did puncture and injure both his lungs, and bruise and injure his bowels, kidneys, stomach, and did crush and crowd his stomach, bowels and lungs downward in his body, which produced paralysis of the spinal nerves and displacement of the stomach, bowels, kidneys and liver, and did crowd and push his bowels down into his pelvic cavity, all to the permanent injury of the plaintiff, and said injuries as aforesaid did affect all the nerves in the body of this plaintiff, which has left him a nervous wreck, and has resulted in injury to his mental condition, causing him lapse of memory and partial loss of mind. Plaintiff avers that before said injuries, he was a strong able-bodied man of twenty years, capable of earning and did earn \$5 per day as a coal miner, and that since this injury plaintiff has not been able to do any work, and is permanently injured. Plaintiff avers that said injury was caused solely by the carelessness and negligence of the defendant as aforesaid in carelessly and negligently having and permitting a boulder

or stone to project out of the said roof in the said main east entry, a distance of six inches, in such a manner as to cause it to come in contact with the bodies of drivers in the usual course of their work as aforesaid, and plaintiff has been injured by said carelessness and negligence of the defendant in the sum of \$10,000, for which he demands judgment.

The appellant, in arguing its motion to make the complaint more definite and certain, said: "The theory of the complaint is that plaintiff was a strong able-bodied man of twenty years, and that his work was that of a mule driver. That the defendant permitted a stone or boulder to project six inches down from a roof in an entry through which plaintiff's work required him to go. That the top of the car furnished to plaintiff came within one foot of the roof. That plaintiff sat on top of the car because he was ordered to do so by the defendant." On these facts the appellant asserts that the complaint would be demurrable as showing contributory negligence on the part of plaintiff, except as it might be saved by the averment "in accordance with the custom, rules and usage obtaining and existing in defendant's mine, and with the knowledge and consent of defendant, and by the instructions of defendant," in other words, the averment of obedience to an order.

It will be observed that the appellant says that the complaint alleges that plaintiff sat on *top* of the car. An examination of the complaint shows that it does not contain such allegation. It does not state whether the plaintiff was riding on *top* of the car or on the side of the car or on the bumpers, but simply that he was sitting on said car of dirt. The allegation in that respect is as follows: "And plaintiff further avers that in driving down said main east entry he was, in accordance with the custom, rules and usage obtaining and



existing in defendant's mine, and with the knowledge and consent of defendant, and by the instructions of defendant, sitting on said car of dirt."

In another place in the complaint it states: "And plaintiff further avers that said stone carelessly and negligently projecting out and down from the said roof of the said main east entry, as aforesaid, did strike this plaintiff's left shoulder and the top of his back; and the said car *in* which the plaintiff was riding was moving forward rapidly at said time."

The appellant has not included in his motion to make more definite and certain any request that the plaintiff be required to state upon what part of the car he was riding, but simply assumes that he was riding on *top* of the car. The appellant further says in argument on said motion: "The complaint is sought to be bot-tomed on the averment that plaintiff sat on top of the car because of and in obedience and conformity to the order of defendant. That such order was a breach of defendant's duty to plaintiff and eliminated the defense of defendant that on the face of the pleading, plaintiff was guilty of contributory negligence of such nature as that it contributed to the proximate cause of the damage, and that the appellant had a right to have the alleged instruction set out in substance or tenor so as to show whether it was a general instruction or a specific order." And appellant contends that the order for the giving of which the master can be held liable must be a special order as contradistinguished from a general order.

It was not necessary to show by any allegation in the complaint or in any manner whether the order alleged

was general or special, and the defendant's con-

1. tention in this regard cannot be sustained because it has been held that §2 of the Employers' Liability Act of 1911 (Acts 1911 p. 145, §8020b Burns

1914) makes no distinction between general and special orders. *Vivian Collieries Co. v. Cahall* (1915), 184 Ind. 473, 110 N. E. 672.

The allegation in the complaint that the plaintiff was, by the instruction of the defendant, sitting on said car of dirt while driving down said main east entry,

2. was a direct averment of the fact that defendant had instructed the plaintiff to sit on said car of dirt while driving down said entry. *Cumberland Tel., etc., Co. v. Hatter* (1909), 44 Ind. App. 625, 89 N. E. 912; *Pittsburgh, etc., R. Co. v. Bir* (1914), 56 Ind. App. 598, 105 N. E. 921.

In the case of *Pittsburgh, etc., R. Co. v. Ross* (1907), 169 Ind. 3, 80 N. E. 845, an allegation of the complaint which sought to establish a duty toward the plain-

3. tiff at the place where he was working was that "in obedience to such order, he went between said cars and proceeded to adjust the couplers, using due care." Speaking generally of the merits of a motion to make the complaint more specific, the court said that "each paragraph of amended complaint fully meets the requirements of good pleading, and the several motions to make the same more specific were properly overruled." In the case of *Ohio, etc., R. Co. v. Craycraft* (1892), 5 Ind. App. 335, 32 N. E. 297, it was held that a complaint alleging "that the defendant on the 31st day of May, 1889, without any fault or negligence on plaintiff's part, carelessly, negligently and wrongfully ran its train over and upon the defendant's brown horse mule," was sufficiently specific. Where a motion to make more specific might properly be sustained, it is not reversible to overrule it if the pleading is sufficiently specific to make apparent the precise nature of the charge the defendant is called upon to meet and defend, since he is not harmed by overruling such motion. *Kinmore v. Cresse* (1913), 53 Ind. App. 693, 102 N. E. 403.

It was not error to overrule appellant's motion to make the complaint more specific.

The defendant in the memorandum attached to its demurrer for want of facts asserts that the allegations in the complaint are mere conclusions and recitals

4. of the pleader, and that the complaint on its face affirmatively shows contributory negligence.

This contention cannot be sustained. As to recitals and conclusions the act of April 30, 1913 (Acts 1913 p. 850, §343a Burns 1914), provides that all conclusions stated in any pleading, paper or writing shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of said pleading, paper or writing, and further provides that, as against such conclusions, only the following remedy is given: That a motion may be made to require the party filing such pleading, paper or writing to state the facts necessary to sustain the conclusion alleged, setting out therein the facts claimed to be necessary thereto. If no such motion is made and ruled upon, all objections on account thereof are waived. It also provides that all recitals in such pleading, paper or writing shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof. In this case the defendant did not make any motion claiming that the allegations of the complaint were conclusions and to require the plaintiff to state the facts necessary to sustain the conclusions alleged, setting out therein the facts claimed to be necessary thereto. The complaint charges appellant with failure to furnish appellee with a safe place in which to work, and it describes the place and states why it was unsafe, and states the injury resulting from such breach of duty. It also shows by averment that the appellee was in the line of duty when injured, and that he was working under the instructions of the defendant.

In construing a complaint where a demurrer is interposed, it will be deemed sufficient whenever the necessary allegations can be fairly gathered from all

5. the averments, even though stated illogically and by way of argument, and all facts will be deemed stated that can be implied from the allegations

6. made by fair and reasonable intendment, and facts so impliedly averred will be given the same

force as if directly stated. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Agar v. State* (1911), 176 Ind. 234, 94 N. E. 819; *Valparaiso Lighting Co. v. Tyler* (1911), 177 Ind. 278, 96 N. E. 768; *Richmond Light, etc., Co. v. Rau* (1915), 184 Ind. 117, 110 N. E. 666. The rule that every material fact must be positively and directly alleged has been relaxed, and a fact pleaded by means of participial phrases will be given the same force and effect as though directly stated. *Darter v. Grubb* (1913), 56 Ind. App. 206, 102 N. E. 843.

A complaint in a servant's action for personal injuries is not insufficient on demurrer merely upon the ground that certain material facts are not directly

7. averred, and that their existence is left to inference. *Vivian Collieries Co. v. Cahall, supra.*

When the court can perceive that reasonable men might honestly differ in their conclusions, and the facts set out in the complaint are of a character to be

8. reasonably subject to more than one inference or conclusion as to whether negligence or contributory negligence exists, the question is one for the jury, and cannot be determined as one of law. *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005.

The complaint in this case shows a legal duty owing by the appellant to the appellee—to use reasonable care—to make the working place of appellee safe for

9. the kind of work which he was doing, a breach of that duty by the appellant, and injury to the appellee as a result of that breach of duty. The
10. complaint need not specifically allege that a duty was owing from defendant to the plaintiff, since the existence of a duty depends upon the facts alleged, and the law will imply its existence where the facts pleaded warrant such inference. *Pennsylvania Co. v. Sears* (1894), 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; *Rock Oil Co. v. Brumbaugh* (1915), 59 Ind. App. 640, 108 N. E. 260; *Bedford, etc., R. Co. v. Rainbolt* (1885), 99 Ind. 551. A complaint showing that defendant owed the plaintiff a duty and containing a general charge of the negligent failure to discharge that duty which resulted in the injury complained of is sufficient to withstand a demurrer. *Kinmore v. Cresse, supra*. The court did not err in overruling the demurrer to the complaint.

The appellant assigns as error that the trial court erred in overruling appellant's motion for a new trial. The questions which appellant seeks to present under this agreement depend upon the bill of exceptions containing the evidence. The appellee asserts that this bill of exceptions is not properly in the record and is not before this court.

The record shows that on April 10, 1915, the motion for a new trial was overruled, and ninety days given in which to file a bill of exceptions, and on June 14, 1915, the time within which to file a bill of exceptions was extended ninety days from said June 14, 1915, and that on August 21, 1915, the bill of exceptions was filed with the clerk of the Vigo Circuit Court, and that said bill of exceptions had been presented to the trial judge for settlement and signature on August 20, 1915. The time granted in the original order for filing the bill of exceptions expired July 9, 1915.

The only proceedings had in this cause to secure an extension of time were had on June 14, 1915, the entire proceedings being as shown by the record herein, as follows: "Comes now the defendant herein by its counsel aforesaid and asks the court for an extension of time within which to file a bill of exceptions herein, which said request of defendant the court now grants. It is therefore ordered by the court that the time of said defendant within which to file said bill of exceptions be and the same is hereby extended ninety days from this 14th day of June, 1915."

Section 661 Burns 1914, Acts 1911 p. 193, provides that, whenever time has been given in which to file a bill of exceptions containing the evidence, and the

11. party to which such time was given is unable to tender such bill of exceptions within the time given on account of the failure or inability of the court reporter to prepare and furnish a transcript of the evidence, the court during any subsequent term of such court, or the judge thereof in vacation, may grant a reasonable extension of the time already granted within which to file such bill of exceptions, under the following provisions: (1) The party asking for the extension of time shall file a written application under oath that said party is unable to tender such bill of exceptions within the time given on account of the failure or inability of the court reporter to prepare and furnish a transcript of the evidence. (2) The party asking such re-extension of time shall give the opposite party or his attorneys of record at least three days' notice of the time when and the place where said application would be heard. (3) The application must be made and a time for the hearing thereof set for a day prior to the expiration of the time first given. (4) No extension of time shall be granted in any case unless it is shown that such failure or inability of the court reporter was not

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Sisk v. State, ex rel.—188 Ind. 328.

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caused by the negligence of the party asking such re-extension of time.

The record does not show a compliance with the statute, §661 Burns 1914, *supra*, but shows that said statute was ignored. Under the facts as shown by the record the order extending the time for filing the bill of exceptions is void, and said bill of exceptions is not in the record. *English v. English* (1914), 182 Ind. 675, 107 N. E. 547; *Richmond Light, etc., Co. v. Rau, supra*.

The appellant claims that the court erred in giving certain instructions because they were not applicable to the evidence and because they assumed certain facts to be true when there was a conflict in the evidence regarding such facts. In the absence of the evidence it cannot be held that there was error in regard to the instructions given or in relation to the refusal to give those tendered. *Richmond Light, etc., Co. v. Rau, supra*.

No reversible error being shown in the record, the judgment is affirmed.

NOTE.—Reported in 123 N. E. 409.

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SISK ET AL. v. STATE OF INDIANA, EX REL. ERIE  
STONE COMPANY.

[No. 23,247. Filed June 3, 1919.]

APPEAL.—*Matters Reviewable*.—*Bill of Exceptions*.—Objections to the giving of instructions which necessitate a consideration of the evidence present no question for review where neither the bill of exceptions by which the appellant attempted to make the instructions part of the record, nor that containing the evidence, was filed during the term in which the cause was tried or during the time given for that purpose.

From Adams Circuit Court; *David E. Smith*, Judge.

Action by the State of Indiana, on relation of the Erie Stone Company, against J. Leonard Sisk and

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Sisk v. State, ex rel.—188 Ind. 328.

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others. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

*A. L. Sharpe and Jesse C. Sutton, for appellants.*

*Peterson & Moran, C. J. Lutz, Moran & Gillespie, A. L. Sharp, Jesse C. Sutton and H. B. Heller, for appellee.*

MYERS, J.—This was an action by appellee, the Erie Stone Company, to recover upon a contractor's bond for stone and material furnished appellants in the construction of a macadam road. The complaint in two paragraphs, answered by a general denial, a plea of payment, set-off, and a counterclaim in two paragraphs, with a reply of general denial to each affirmative paragraph of answer and to each paragraph of the counterclaim, formed the issues submitted to a jury for trial, resulting in a verdict for \$8,237.94 in favor of the stone company, and judgment followed in its favor against appellants.

The overruling of appellant's motion for a new trial is assigned as error, and is the only error assigned and not waived. The specifications relied upon to support the motion require a consideration of the evidence. The giving of certain instructions are challenged, but not on the ground that they were improper and erroneous upon any state of the evidence admissible under the issues. The instructions are here, if at all, only by a bill of exceptions. Appellee makes the point that neither the evidence nor the instructions are properly a part of the record.

It appears from the record that the jury returned its verdict into the Adams Circuit Court on May 3, 1916. On May 15, 1916, appellants filed their motion and specifications for a new trial. On October 27, 1916, appellants' motion for a new trial was overruled and the stone company was given judgment on the verdict. On that day appellants prayed an appeal to the Supreme Court,



which was granted, amount of bond fixed, and thirty days given in which to file same, also ninety days given in which to file their bill of exceptions. The transcript fails to disclose an order-book entry showing the filing of any bill of exceptions within the time allowed by the court, or that any extension of time was given in which to file bills of exception, nor is there any order-book entry or certificate of the trial judge showing that any bill of exceptions was filed or even tendered to the court for settlement within the time allowed therefor. The only order-book entry in any manner referring to the filing of a bill of exceptions is of date April 23, 1917, and is as follows: "Comes now the defendants by their attorney A. L. Sharp and files herein their bill of exceptions number 1 in these words, (H. I.) and the same is signed, sealed and made a part of the record herein." This order-book entry refers to what purports to be bill of exceptions No. 1 embodying the evidence, and to which is attached the certificate of the trial judge in effect authenticating the correctness of the transcript of the evidence as made by the reporter from his shorthand notes of the evidence taken at the trial, together with all objections and rulings of the court and exceptions thereto. This certificate is dated April 23, 1917.

This state of the record, as pointed out by appellee, and unchallenged by appellants, and, upon examination, we find to be correct, compels us to hold that neither the evidence given in the cause, nor the instructions tendered by the appellants and refused, as well as the instructions given by the court, are a part of the record. Therefore any questions depending upon the evidence, or questions pertaining to the instructions, are not presented, for the reason it clearly appears from the record that the bills of exceptions relied on by appellants were not filed within the term at which the cause was tried, nor were they filed within the time given by the

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Advisory Board, etc. v. State, ex rel.—188 Ind. 331.

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court for that purpose. *Lengelsen v. McGregor* (1903), 162 Ind. 258, 67 N. E. 524, 70 N. E. 248; *Taylor v. Schradsky* (1912), 178 Ind. 217, 97 N. E. 790; *Haehnel v. Seidentopf* (1916), 63 Ind. App. 218, 114 N. E. 422; *North American Union v. Oleske* (1916), 64 Ind. App. 435, 116 N. E. 68; *Huntingburg Bank v. Morgenroth* (1916), 64 Ind. App. 315, 115 N. E. 798.

Judgment affirmed.

NOTE.—Reported in 123 N. E. 401.

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ADVISORY BOARD OF MORGAN TOWNSHIP, HARRISON  
COUNTY, v. STATE OF INDIANA, EX REL.  
MARTIN ET AL.

[No. 23,472. Filed April 24, 1919. Rehearing denied June 3, 1919.]

1. APPEAL.—*Record on Appeal.*—*Sufficiency.*—Alleged error in overruling a demurrer to a paragraph of complaint will not be considered where the appellant's brief does not set out such paragraph, the demurrer, the memorandum, nor any statement of the record by which the court on appeal can tell what the contentions are, as required by the fifth clause of Rule 22. p. 332.
2. APPEAL.—*Briefs.*—*Statute.*—Section 3, Acts 1917 p. 523, is void so far as briefing is concerned. p. 332.

From Harrison Circuit Court; *William Ridley*, Judge.

Proceeding by the State of Indiana, on the relation of Oswell Martin and others, against the advisory board of Morgan township, Harrison county. From a judgment for the relators, the defendant appeals. *Affirmed.*

*C. W. Cook, Kirkham & O'Bannon*, for appellant.

*Thos. S. Jones and Clyde R. Lottick*, for appellees.

TOWNSEND, J.—Appellee obtained a judgment of mandate against appellant. The complaint was in four paragraphs. The trial court sustained demurrer to all,

except the third. The cause was tried by jury on issue formed by answer to the third paragraph. Appellant says in its brief that it relies for reversal of the cause upon error of the court in overruling the demurrer to the third paragraph of the complaint. Appellant's

brief does not set out this paragraph of com-

1. plaint; does not set out the demurrer thereto; does not set out memorandum attached to the demurrer; does not give any statement of the rec-

2. ord by which this court can tell what its contentions are. Sub-division 5, Rule 22. §3, chapter 143, Acts 1917 p. 523, is void so far as briefing is concerned. *Solimeto v. State* (1919), *ante* 170, 122 N. E. 578.

Judgment of the trial court is affirmed.

NOTE.—Reported in 123 N. E. 108.

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### HORNING v. MCGILL.

[No. 23,269. Filed May 31, 1917. Rehearing denied June 4, 1919.]

1. **CONTRACTS.**—*In Violation of Statute.—Recovery.*—There can be no recovery on a contract made in violation of a statute as between the parties thereto, the violation of which is prohibited by a penalty. p. 334.
2. **NAMES.**—*Assumed Business Name.—Failure to File Certificate.*—The failure of the plaintiff to comply with §9711a *et seq.* Burns 1914, Acts 1909 p. 358, requiring persons conducting business in the state under any name, etc., other than their real names to file certificates with the clerk, etc., renders void and prevents recovery on a sales contract made by him. p. 334.

From the St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Emanuel M. Horning against William McGill. From a judgment for the defendant, the plaintiff appeals. *Affirmed.*

*Lenn J. Oare* and *Russell W. Geyer*, for appellant.

*John W. Kitch* and *John S. Buczkowski*, for appellee.

ERWIN, C. J.—This action was in replevin, brought by appellant against appellee before a justice of the peace. Appeal was taken to the circuit court. The complaint in one paragraph alleges unlawful detention of personal property, which complaint was answered in three paragraphs. Demurrer to second and third paragraphs of answer was sustained. Appellee then filed his amended second paragraph of answer. Upon the issues so joined trial was had. At the end of plaintiff's (appellant's) evidence appellee made a motion for a peremptory instruction to direct a verdict for defendant (appellee), which was sustained by the court. The court thereupon directed a verdict for appellee. Overruling of the motion for a new trial is assigned as error in this court. The only question for the consideration of this court is the giving by the court of the peremptory instruction to the jury directing a verdict for the defendant.

The evidence shows that appellee entered into a contract of sale for certain articles with the East Jefferson Boulevard Furniture Store; that appellant was the owner of the said store; that no certificate showing ownership was filed with the clerk of the county.

The statute in this state makes it unlawful for any person or persons conducting or transacting business in this state under any name, designation, or title other than the real name or names of the persons conducting such business without first filing a certificate stating the firm or partnership, place of business, and the full name and residence of the persons engaged in or transacting such business, with the clerk of the circuit court of the county in which place or places of business may be situated. Acts 1909 p. 358, §9711 *et seq.* Burns 1914. The appellant had not complied with the provisions of this law.

"If the statute prescribes what shall be done before

the right to do a certain thing, or carry on a certain business, is granted, and prohibits such business under penalty, the fact that the violation of the act is made a misdemeanor implies a prohibition, and gives to it the same effect it would have if the statute expressly declared void contracts made in carrying on such business." *Beecher v. Peru Trust Co.* (1911), 49 Ind. App. 184, and cases cited on page 187, 97 N. E. 23, 25.

"That there can be no recovery on a contract made in violation of a statute, as between the parties thereto, the violation of which is prohibited by a penalty, is a

1. principle well recognized by the courts. This is true, although the statute does not, in terms, pronounce the contract void nor expressly prohibit the same." *Sandage v. Studebaker Bros. Mfg. Co.* (1895), 142 Ind. 148, and cases cited on page 156, 41 N. E. 380, 382, 34 L. R. A. 363, 51 Am. St. 165.

The statute, as to registering the name under which appellant desired to conduct his business, not having been complied with, the contract of sale under

2. which appellant claims title to the property in question is wholly void, and the court did not err in directing a verdict for appellee.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 303.

### CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY v. PUBLIC SERVICE COMMISSION.

[No. 23,493. Filed December 19, 1918. Rehearing denied June 6, 1919.]

1. RAILROADS.—*Construction of Interchange Track.—Public Necessity.—Sufficiency of Evidence.*—The question whether there is a public necessity for the physical connection between railroad companies for the interchange of freight must be determined in each case in the light of all the facts, and with a just regard to the advantage to be derived by the public

Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

- and the expense to be incurred by the carrier; it is not sufficient to show that a mere convenience would result to a few individuals, but it must appear that material and substantial benefit would result to the public from such connection. p. 337.
2. RAILROADS.—*Construction of Interchange Track.—Order of Public Service Commission.—Sufficiency of Evidence.*—In an action by a railroad company to set aside an order of the Public Service Commission directing a physical connection of railroads for interchange of freight in carload lots, where no shipper or receiver of freight testified in the trial and there was no evidence to show that any freight in carload lots would be transferred over the proposed interchange tracks, and there was evidence tending to show that the company seeking such connection was actuated in part by a desire to gain an advantage in its contest for business, the showing is insufficient to justify an order for interchange tracks. pp. 337, 339.
  3. RAILROADS.—*Construction of Interchange Tracks.—Public Necessity.*—The law does not contemplate that orders for the construction of interchange tracks between railroad companies shall be made for the purpose of aiding one carrier as against another in its competition for business, nor will such an order be denied because it may afford facilities advantageous to a company interested; the necessities of the public is the test in such cases, though the showing need not be of indispensable public necessity, the test being satisfied where it is shown that the construction of such interchange tracks will be a great convenience to shippers and will add materially to transportation facilities so as to be of substantial benefit to commerce. p. 339.
  4. APPEAL.—*Bill of Exceptions Containing Evidence.—Sufficiency.*—If a bill of exceptions purporting to contain all the evidence discloses on its face that it does not contain all the evidence given at the trial, then the court on appeal will not consider the evidence for the purpose of determining whether it sustains the finding. p. 340.
  5. PUBLIC SERVICE COMMISSION.—*Setting Aside Order.—Transcript of Proceedings.—Effect as Evidence.—Bill of Exceptions.*—Under §§69, 70 of the Public Service Commission Act (Acts 1913 p. 167, §10052a *et seq.* Burns 1914), a part of the transcript of the proceedings before the commission which is not put in evidence at the trial of an action to set aside an order, is not a part of the evidence heard at the trial, and should not be embodied in the bill of exceptions containing the evidence to be used on appeal. p. 341.

From Porter Circuit Court; *H. H. Loring*, Judge.

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Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

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Action by the Chicago, Indianapolis and Louisville Railway Company against the Public Service Commission. From a judgment for the commission, the plaintiff appeals. *Reversed.*

*Crumpacker Bros., Perry McCart and C. C. Hine* for appellant.

*Ele Stansbury, Attorney-General, U. S. Lesh, S. H. Tolles and F. J. Lewis Meyer,* for appellee.

LAIRY, J.—On application of the Chicago, Lake Shore and South Bend Railway Company, the Public Service Commission made an order directing that a physical connection should be constructed for the transfer of freight in carload lots between the lines of that company and the lines of the Chicago, Indianapolis and Louisville Railway Company at Michigan City, Indiana. The order contemplates the construction of an interchange track connecting the two lines of railroad, and provides that, in case the two companies should be unable to agree on a division of the costs, either company might apply to the commission for an apportionment of the costs. Appellant filed an action against the appellee to have the order set aside and declared null and void. This action was tried in the Porter Circuit Court, and resulted in a judgment in favor of appellee. Appellant assigns as error that the trial court erred in overruling its motion for a new trial, which was based on the grounds that the decision of the trial court was not sustained by the evidence and was contrary to law.

In support of the assignment of error it is asserted by appellant that the location of the proposed connection and its situation with respect to the streets of the city and the existing railroad tracks render the construction of the connecting track unpractical and its operation dangerous. Upon this question there is evidence to sup-

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Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

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port the decision of the court, although there is some conflict.

It is next claimed that the evidence does not show that the physical connection for the interchange of freight will result in any substantial benefit to the pub-

1. lic by affording an additional convenience or accommodation to shippers or receivers of freight, or that it will in any way facilitate or improve shipping conditions. In discussing a similar case, the Supreme Court of Ohio well said: "The question of public necessity must be determined in each case in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier, and upon a consideration of the evidence showing the places and persons interested, the volume of business to be affected, the saving of time and expense to shippers as against the cost and loss to the carrier. (*Oregon Rd. & Nav. Co. v. Fairchild*, *supra* [224 U. S. 510.]) It is not enough that it be shown that a mere convenience would be furnished to a few individuals by the proposed change, but it must appear that material and substantial public benefit and advantage would result therefrom." *Akron, etc., R. Co. v. Public Util. Comm.* (1917), 96 Ohio 359, 117 N. E. 314; *Wheeling, etc., R. Co. v. Public Util. Comm.* (1917), 96 Ohio 370, 117 N. E. 317.

After a full consideration, the court is of the opinion that there is no substantial evidence that there exists any public necessity for the physical connection

2. ordered by the commission. No shipper or receiver of freight testified in the case, and there is no evidence to show that any freight in carload lots would be transferred from either of the roads to the other over the interchange track contemplated if the same were to be constructed. It is shown by the evi-



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Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

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dence that the Chicago, Lake Shore and South Bend Railroad Company receives for its own consumption each year 1,400 or 1,500 carloads of coal, which could be transferred to its tracks by means of the proposed interchange track. This coal comes from some place in the Brazil fields over the Chicago, Indianapolis and Louisville Railway, and in the past the cars have been switched from the tracks of that road to the tracks of the Lake Erie and Western Railroad Company, and from the tracks of that road to those of the Chicago, Lake Shore and South Bend Railroad Company over interchange tracks already in existence. This involves a double switching charge which the Chicago, Lake Shore and South Bend Railroad Company seeks to avoid by securing the contemplated interchange track. The president and general manager of the Chicago, Lake Shore and South Bend Railroad Company, Mr. Wilcoxon, testified that the tracks in Michigan City were already open to the company which he represented, and that all freight in carload lots could move over the lines of such road into Michigan City over its connection with the Lake Erie and Western Railroad Company and its connecting lines, and that the proposed connection, if provided, would afford his company facilities for getting into the Haskell and Barker plant which otherwise it would not have, and also would enable it to abate the double switching charge. The same witness also testified that, if such terminal facilities with Haskell and Barker Company could be secured, his company would obtain a part or all of the line haul on freight destined for Haskell and Barker Company, which otherwise would be carried by the Chicago, Indianapolis and Louisville Railroad Company. It thus appears that the company seeking the connection is actuated, in part at least, by a desire to gain an advantage in its contest for business.

This court has recently decided that the law does not

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Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

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contemplate that orders of this kind will be made for the purpose of aiding or assisting one carrier as

3. against another in its competition for business.

*Indiana Harbor Belt R. Co. v. Public Service Commission* (1918), 187 Ind. 660, 121 N. E. 540. It may be said with equal force that such an order will not be denied because it may have the effect of affording facilities which will be of advantage to one of the companies interested in securing business which otherwise would be handled by another company. Such controversies are wholly foreign to the considerations which control the action of the commission making or denying such orders and of the courts in passing on their validity. The necessities and requirements of the public is the paramount consideration in all such cases. Public necessity is the test; but it does not follow that a physical connection must be indispensable to the public in order to be a public necessity as the expression is here used. When it is shown that such a connection will be a great convenience to shippers and that it will add materially to available transportation facilities so as to be a substantial benefit to commerce, it will be held to satisfy the test. *Lourie Mfg. Co. v. Cincinnati, etc., R. Co.* (1916), 42 I. C. C. 448.

The evidence bearing on the benefits to be derived by the public from the establishment of the interchange track contemplated by the order is purely conjectural and speculative in character. The court is of the opinion that it does not satisfy the test, and that the order is not justified by evidence showing a public necessity.

The judgment is reversed with instructions to sustain appellant's motion for a new trial.

## ON PETITION FOR REHEARING.

LAIRY, C. J.—On petition for rehearing, appellee complains of the action of this court in basing its opinion on the evidence without discussing a preliminary question presented by the briefs which, if decided in favor of appellee, would have precluded a consideration of the evidence on appeal.

In its brief in answer to the assignment of errors, appellee took the position that the bill of exceptions purporting to contain the evidence discloses on its

4. face that it does not contain all the evidence given at the trial. If appellee were correct in this position, the court could not consider the evidence for the purpose of determining whether or not it sustained the finding. *McMurren v. Hannum* (1916), 185 Ind. 326, 113 N. E. 238; *Wagner v. Wagner* (1915), 183 Ind. 528, 109 N. E. 47.

The matter thus presented was considered by the court but was not discussed in the opinion, it being assumed that a decision based on the evidence would imply that the preliminary question mentioned had been decided adversely to appellee. It could hardly be assumed that a court would overlook a matter so vital to the decision rendered.

The record shows that a transcript of the evidence taken before the Public Service Commission on the hearing was filed with the clerk of the court in which the action was brought in accordance with the provisions of §69 of the act creating the commission. Acts 1913 p. 167, §10052a *et seq.* Burns 1914. On the trial, parts of the evidence contained in the transcript so filed were offered and admitted in evidence, and the parts so introduced are embodied in the bill of exceptions as a part of the evidence. The transcript as a whole was not offered or read in evidence, and the parts not offered in

Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

evidence are not set out as a part of the evidence in the bill of exceptions.

Appellee takes the position that, in an action brought to set aside an order of the Public Service Commission, the evidence on which the order was based as

5. taken before the board, when filed with the clerk of the court in which the action is brought in accordance with §69, *supra*, becomes a part of the evidence at the trial; and that the court trying the cause is required to consider all of the evidence contained in the transcript so filed even though it is not offered in evidence at the trial. Appellee therefore insists that all the evidence contained in the transcript filed with the clerk should have been embodied in the bill of exceptions as a part of the evidence heard at the trial, and that a bill of exceptions containing only the parts offered and admitted in evidence at the trial is incomplete.

Section 70 of the act cited provides, that: "A transcript copy of the evidence and proceedings, or any specific part thereof, on any investigation taken by the stenographer appointed by the commission, being certified under oath by such stenographer to be a true and correct transcript of all the testimony on the investigation of a particular witness, or of other specific part thereof, carefully prepared by him from his original notes, and to be a correct statement of the evidence and proceedings had on such investigations so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the effect so certified."

It is apparent from the plain provisions of the act that the purpose of the legislature in requiring the transcript to be filed with the clerk of the court in which the action to set aside the order is pending before the case is reached for trial was to make such transcript

available to either party at the trial, so that the whole or any part of the evidence contained therein might be introduced at the trial if authenticated in such a way as to make it admissible under the provisions of §70, *supra*. There is nothing in the act to indicate that the legislature intended that the mere filing of the transcript with the clerk of the court should have the effect of making the evidence contained therein a part of the evidence at the trial. The position of appellee on this point is untenable.

At the 1913 session of the legislature an act was passed amending §6 of the act creating the railroad commission. This section as amended provides a method of procedure in cases to be brought by any carrier or other party dissatisfied with any final order made by the commission. This section provides that in all actions in the courts of this state authorized by this act the rules of evidence shall be the same as in the trial of civil cases as now provided by law, except as otherwise provided in this act. The act of which this section is a part makes no provision for the filing of any transcript of the proceedings of the commission on which an order is based with the clerk of the court in which an action is filed to suspend or set aside the order.

If the question were presented the court would be required to decide whether the provisions of §§69, 70 and 81 of the Public Utilities Act apply to actions brought under the provisions of §6 of the Railroad Commission Act, as amended. The court does not hold, nor does it intend to intimate by anything said in this opinion, that the sections of the Public Utilities Act providing a method of procedure in actions to set aside orders of the commission regulating public utilities as defined in that act are to be applied to the proceedings brought under the provisions of amending §6 of the Railroad Commission Act. The holding is that any

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Chicago, etc., R. Co. v. Public Service Commission—188 Ind. 334.

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part of the transcript of the proceedings before the commission which is not put in evidence at the trial in the ordinary way cannot be considered as a part of the evidence heard at the trial, and should not be embodied in the bill of exceptions containing the evidence to be used on appeal.

Petition denied.

Myers, J., concurs in a separate opinion.

### CONCURRING OPINION.

MYERS, J.—I concur in the majority conclusion that the petition for a rehearing should be denied.

Briefly stated, this was an action by appellant under §6 of the Railroad Commission Act as amended in 1913 (Acts 1913 p. 820, §5536 Burns 1914), against appellee to set aside an order made by appellee in a proceeding begun under §1, cl. L, Acts 1917 p. 118, in force March 1, 1917, before the Public Service Commission by the Chicago, Lake Shore and South Bend Railway Company against appellant. The act under which the present action was begun provides that: "In all actions in the courts of this state authorized by this act, the rules of evidence shall be the same as in the trial of civil cases, as now provided by law, excepting as otherwise provided in this act." The phrase "as otherwise provided in this act" has no application to the question here involved. The original proceedings, as well as the instant case, was brought and proceeded to final judgment in accordance with the Railroad Commission Act as amended and supplemented, and in force March 1, 1917. This latter act has no provision requiring the Public Service Commission to file a certified transcript of the proceedings had before it in actions brought under amended §6 to suspend or set aside an order as is required by §69 of the Public Service Commission Act,

Chicago, etc., *R. Co. v. Public Service Commission*—188 Ind. 334.

where actions are commenced against the commission under §§78-86 of that act. Acts 1913 p. 167, §10052a *et seq.* Burns 1914.

Appellee contends that the transcript furnished by the commission under the provisions of §69 of the Public Service Commission Act, *supra*, and filed with the clerk of the Laporte Circuit Court, where this action was originally brought, as a matter of law made it a part of the evidence in this case, and as only part of it is in the record as appears from the bill of exceptions, it necessarily follows that all of the evidence is not in the record, and this court is for that reason precluded from passing upon any question requiring a consideration of the evidence. The transcript of the evidence included in the bill of exceptions before us concludes with the statement "and this was all the evidence given in said cause," and the trial court certifies to the correctness of the bill. This bill imports absolute verity. It cannot be contradicted here except only by such contradiction as affirmatively appears from the bill itself. *Citizens Street R. Co. v. Heath* (1899), 154 Ind. 363, 55 N. E. 744; *Hodgin v. Hodgin* (1910), 175 Ind. 157, 93 N. E. 849; *Baltimore, etc., R. Co. v. Kleespies* (1906), 39 Ind. App. 151, 161, 76 N. E. 1015, 78 N. E. 252; *Whisler v. Whisler* (1903), 162 Ind. 136, 67 N. E. 984, 70 N. E. 152.

Appellee insists that the bill of exceptions containing the evidence affirmatively shows that a part of the evidence is omitted therefrom. Its contention is based upon the following statement in the record. "Mr. McCart (attorney for appellant): We have here, your honor, the record before the Public Service Commission of Indiana, which was filed by the Attorney-General of Indiana, and I now offer it in evidence. The Court: Is there any objection? Mr. Meyer (attorney for appellee): No objection. Mr. McCart: I offer in that

record, pages 1 to 5 inclusive, which is a petition by the South Shore for this connecting track." Other pages were designated and offered in evidence, and on conclusion of these offered pages they were read in evidence and ordered by the court that they be admitted in evidence.

It is not contended that the bill of exceptions does not contain all of the evidence offered and read in evidence from the transcript of the original case before the Public Service Commission as well as all testimony or other evidence introduced at the trial of this cause. The fact that other evidence was offered, but not introduced or ordered made a part of the evidence in the cause, does not make it a part of the evidence in the case. This not being an action commenced against the commission under the provisions of §§78-86 of the Public Service Commission Act approved March 4, 1913, nor was the order which is sought to be set aside made under any provision of that act, it follows that §69, *supra*, has no application, and appellee's contention cannot be sustained, and the petition for a rehearing should be denied.

NOTE.—Reported in 121 N. E. 276, 123 N. E. 465, 466.

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### MOORE v. RYAN ET AL.

[No. 23,462. Filed June 20, 1919.]

1. DRAINS. — *Remonstrance*. — *Commissioners' Reports*. — *Evidence*. — *Presumption*. — On the trial of a remonstrance to the report of drainage commissioners, alleging that the remonstrant's land will not be benefited to the extent of the assessment, the report is only *prima facie* evidence of the matters contained therein, and is admissible only by virtue of the statute (§6151 Burns 1914, Acts 1907 p. 508); its only effect is to compel the remonstrants to go forward with the evidence sustaining the remonstrance, and when that is done, the pre-



sumption growing out of the *prima facie* case made by the report has served its function and cannot be considered for any other purpose. p. 350.

2. TRIAL.—*Drains.—Benefits.—Evidence.—Court's Inspection of Premises.*—Where, in the trial of a remonstrance to a drainage proceeding, the court by agreement of the parties made a personal inspection of the land affected in order "to apply the evidence heard," the judge's viewing of the land was not in the nature of evidence and cannot be considered with other evidence introduced at the trial. p. 350.
3. DRAINS.—*Construction.—Benefits.—Sufficiency of Evidence.*—In the trial of a remonstrance to a drainage proceeding, the commissioners' report alone is not sufficient to sustain a finding that the remonstrant would be benefited by the improvement to the extent of the assessments where the remonstrant, the only witness for the remonstrance, testified to facts showing the assessments to be in excess of the benefits. p. 350.
4. DRAINS.—*Commissioners' Report.—Illegality of.—Correction.*—Under §6141 Burns 1914, Acts 1907 p. 508, §2, requiring an accurate report of the drainage commissioners as a definite basis for the bidding of contractors, etc., a report delegating to the commissioner of construction the power to withhold payment of such part of the contract price as he might elect was unlawful, and, under §4 of the act (§6143 Burns 1914) the petition should have been referred back to the commissioners for correction. p. 352.

From Jasper Circuit Court; *Elmer Barce*, Specia' Judge.

Proceeding by John P. Ryan and others to establish a drain, in which Austin O. Moore filed a remonstrance. From a judgment establishing the drain, the remonstrant appeals. *Reversed.*

*John A. Dunlap, Quincy A. Myers and W. H. Parkinson*, for appellant.

*George A. Williams, Frank Foltz and U. Z. Wiley*, for appellee.

WILLOUGHBY, J.—This cause was before this court in the case of *Thompson v. Ryan* (1914), 183 Ind. 232, 108 N. E. 98. The record discloses that on September 16, 1909, appellee Ryan and others filed in the circuit court

of Jasper county their petition for a drain, and such proceedings were had that the court ordered the construction of the drain. From this judgment an appeal was taken, and the judgment reversed, with instructions to grant a new trial and proceed upon the report of the commissioners as originally filed. After the cause had been remanded to the circuit court, a remonstrance was filed to this report, and it was held that the same was not according to law and was referred to commissioners for a new report. This second report, upon remonstrance being filed to it, was set aside, being held not according to law. The court then appointed new commissioners, who qualified and filed what is designated in the record as a "new report" on September 22, 1917. To this report appellant Moore and others filed remonstrances, and the cause was tried on such remonstrances, and the court found against the remonstrants, and judgment was rendered establishing the drain.

The appellant and others filed separate motions for a new trial. These several motions were overruled and the remonstrants each took separate and several exceptions to the ruling. In each case thirty days' time was given to file appeal bonds, and sixty days' time to file all bills of exceptions. The remonstrants other than Moore do not appeal. The appellant Moore appeals from the judgment establishing the drain. The only error properly assigned and not waived is that the court erred in overruling appellant's motion for a new trial. Among the reasons for a new trial appellant alleges that the decision of the court is not sustained by sufficient evidence.

The remonstrance of A. O. Moore filed October 4, 1917, after setting out a description of his lands assessed for said improvement, alleges that each and every separate tract of said remonstrant's land assessed as benefited, as above set forth, will not be benefited to the

extent of the assessment by the proposed work if accomplished.

In the trial of appellant's remonstrance the only evidence on behalf of the petitioners was the commissioners' report setting out the separate tracts of appellant's land, and the amounts assessed as benefits against each of said tracts. The only witness testifying in regard to said assessments was the appellant himself, and his testimony places the benefits to said land, and each tract thereof, at less than the assessments thereon, making a total amount of \$941.30 assessed against all of said land more than it would be benefited by the proposed work if accomplished. The appellant contends that "the drainage commissioners' report was only *prima facie* evidence of the things therein contained, and that its only office and effect was to compel the remonstrants to go forward with evidence sustaining the remonstrance." When such evidence has been introduced sustaining the remonstrance, the presumption growing out of the *prima facie* case has served its function and cannot be considered for the purpose of weighing the evidence or for any other purpose. The presumption growing out of a *prima facie* case remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to base a finding solely upon it. *Potts v. Pardee* (1917), 220 N. Y. 431, 116 N. E. 78.

In the case of *City of Rockford v. Mower* (1913), 259 Ill. 604, 102 N. E. 1032, which was a suit to recover compensation for land taken for public improvements, the court says: "In this case, however, the amount awarded as compensation for the land taken was \$500, while the lowest value fixed by any of the witnesses was \$2,000. The report of the commissioners cannot be regarded as evidence either upon the question of value or upon the question of damages. While it is true that section 23 of

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Moore v. Ryan—188 Ind. 345.

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the Local Improvement act provides that such report shall be *prima facie* evidence, both of the amount of the compensation to be awarded, and of the benefits to be assessed, we held in *Chicago Terminal Transfer Railroad Co. v. City of Chicago*, 217 Ill. 343, in considering the constitutionality of that provision, that the effect of the provision was merely to change the burden of proof. In discussing this question we there said: 'Statutes giving *prima facie* weight to facts or to official certificates are properly regarded as rules of procedure changing the burden of proof. In the absence of this statute the city, in the case at bar, would have been required, in the first instance, to assume the burden of producing proof relative to the amount which the appellant company would be entitled to receive by way of compensation for so much of its right of way as would be also occupied by the proposed public way. The statute does no more than to declare that this amount shall be inferred or assumed from the report of the commissioners until evidence to the contrary is introduced.' When plaintiff in error introduced evidence upon the question of the value of the land sought to be taken and upon the question of the damages to the land not taken the report of the commissioners ceased to have any weight as evidence, and it was then incumbent upon the city to meet the evidence offered by plaintiff in error upon these questions, unless the city was satisfied with the values and damages fixed by the witnesses for plaintiff in error. It is apparent that the jury either considered the report of the commissioners as evidence or ignored the testimony of the witnesses and based their verdict entirely upon their view of the premises. That the jury have no right to disregard the testimony of the witnesses and base their verdict upon their view of the premises is well established in this state. *Atchison, Topeka and Santa Fe Railroad Co. v. Schneider*, 127 Ill.

144; *Sanitary District v. Loughran*, 160 id. 362; *East St. Louis, Columbia and Waterloo Railway v. Illinois Trust Co.* 248 id. 559."

We approve the reasoning of the court in the above cases except the statement in regard to changing the burden of proof. That is not the law in this

1. state. The drainage commissioners' report in the case now being considered was only *prima facie* evidence of the things contained therein, and it was only admissible by virtue of the statute, §6151 Burns 1914, Acts 1907 p. 508. *Wilson v. Tevis* (1915), 184 Ind. 712, 111 N. E. 181; *Lake Agr'l Co. v. Brown* (1916), 186 Ind. 30, 114 N. E. 755. Its only office and effect is to compel the remonstrants to go forward with evidence sustaining the remonstrance. When such evidence has been introduced sustaining the remonstrance, the presumption growing out of the *prima facie* case has served its function, and cannot be considered for the purpose of weighing the evidence or for any other purpose. When such evidence has been introduced sustaining the remonstrance, the presumption falls, and the case is then tried as if no such presumption ever existed. *Cleveland, etc., R. Co. v. Wise* (1917), 186 Ind. 316, 116 N. E. 299.

The appellee contends that the trial judge's view of the premises was in the nature of evidence, and should be considered with all the other evidence in the

2. case. We cannot accede to that view. The record recites that: "By consent of all parties interested the court makes personal inspection and  
3. observation of the line, route and termini of said drain together with its laterals and outlets with the view to apply the evidence heard." This shows that it was not intended as evidence by either party. Our conclusion is that the finding of the court was not sus-

tained by sufficient evidence as to the assessments upon the lands of this appellant.

Among the reasons for a new trial appellant alleges that said report of the drainage commissioners is not according to law in that the following provision in said report will have a tendency to prejudice bidders against said improvement, which provision of said drainage commissioners' report reads as follows:

"The contractor shall maintain the ditch and every part thereof to the full width and depth required by this report until the entire ditch and all that part embraced in this contract shall have been completed as required by this report, and the ditch is finally accepted as completed by the court, and a sufficient percentage of the contract price shall be withheld until the contractor complies with this requirement, and if he shall fail to do so, the drainage commissioners shall expend sufficient of the contract price to complete or clean out said ditch and deduct the amount from the contract price."

That the amount held back is indefinite and no contractor will know how much is to be held out at the time he makes the bid; that no contractor who takes the lower portion will know how long he will have to maintain it against the contractor who takes the upper portion. That the contractor who takes the upper portion or some lateral will not know how long he will have to maintain it until the entire ditch is constructed. This was one of appellant's causes of remonstrance.

Appellant contends that the foregoing provision in the report of the commissioners was in violation of the law and by reason of said provision it came within the first statutory cause for remonstrance, and that said report was not according to law; that said report conferred upon the superintendent of construction dangerous discretionary power and opened the door to fraud.

The statute, §6141 *et seq.* Burns 1914, Acts 1907 p. 508, requires of the commissioners a definite, accurate

report, to the end that parties may know in advance the precise character of the proposed drain and that the contractor may have a definite basis for bidding. It is clear that the contractor cannot intelligently bid upon the work when he does not know how much of the contract price will be held back, nor how long it will be held back.

In the case of *Broerman v. Spilker* (1915), 183 Ind. 88, 108 N. E. 226, it was held that the court erred in overruling a remonstrance assailing a provision in the report of the drainage commissioners which provided that the interpretation of the plans and specifications by the engineer, who planned and designed the work, should be the accepted interpretation, and in that case the court said: "The law provides that one of the commissioners shall be a competent engineer. It also provides for a definite, accurate report, fixing metes and bounds, courses and distances, grades and bench marks, with a computation of the cubic yards of excavation, and cost thereof. Provision is made for the services of an engineer to secure accuracy and definiteness to the end that the parties may know in advance the precise character of the proposed drain, and that contractors may have a definite basis for bidding. The engineer's duties are fully performed on the filing of the report, and the contractor is invested with no more power over the plans and specifications than is a stranger."

Whether the commissioners could provide in their report that a definite part of the contract price should be retained until the work was completed, we do not decide, but it seems clear that the commissioners did not have the right to delegate to the commissioner of construction the power to withhold the payment of such part of the contract price as he might elect. The provision delegating the power of the commissioner of construction to withhold a sufficient per-

centage of the contract price to complete or clean out said ditch and deduct the amount from the contract price made said report unlawful, and the court erred in refusing to sustain appellant's remonstrance thereto. The report was not according to law, and the petition should have been referred back to the commissioners for an amended or new report. §6143 Burns 1914, §4, *supra*.

Judgment reversed, and the Jasper Circuit Court is directed to sustain appellant's motion for a new trial, and to sustain appellant's remonstrance, and refer the petition back to the commissioners for an amended or new report.

NOTE.—Reported in 123 N. E. 642.

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BANKS v. STATE OF INDIANA.

[No. 23,535. Filed June 24, 1919.]

1. CRIMINAL LAW.—*Verdict.—Certainty.—Place of Punishment.*  
—A verdict finding the defendant guilty as charged and assessing his punishment "at a fine of \$300, and imprisonment in the county jail for a period of three months, 90 days in the penal farm" was not ambiguous or uncertain as to the place of imprisonment, since, under §9926h Burns 1914, Acts 1913 p. 660, §8, it was the duty of the court to sentence the defendant to the Indiana State Farm, the term being fixed at ninety days. p. 355.
  2. INTOXICATING LIQUORS.—*Statute.—Construction.—"Furnish."*  
—Where the accused, pursuant to an agreement with his son-in-law, purchased intoxicating liquor to be used by them and their families on a future day, the son-in-law furnishing half of the money at the time of making the agreement, the court, in determining whether the accused was guilty of an intent to "furnish" the liquor in violation of §4, Acts 1917 p. 15, will consider the word "furnish" in the concrete as used in the act, rather than in the abstract, keeping in mind the general purpose of the act and the evils intended to be remedied. p. 356.
  3. INTOXICATING LIQUORS.—*Unlawful Keeping.—"Furnish."*  
*Statute.*—Where the accused had in his possession intoxicating
- VOL. 188—23



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Banks v. State—188 Ind. 353.

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liquor which he purchased pursuant to, and with intent to carry out, an agreement with his son-in-law under which the liquor was to be used by them and their families on a future day, the son-in-law having furnished half of the purchase price at the time of making the agreement, he was guilty of keeping intoxicating liquor with intent to "furnish," etc., in violation of Acts 1917 p. 15, though the son-in-law had title to half of the liquor from the time of the purchase. p. 358.

From the Sullivan Circuit Court; *William H. Bridwell*, Judge.

Prosecution by the State of Indiana against John Banks. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Arthur D. Cutler*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

LAIRY, C. J.—Appellant was charged by indictment in the trial court with violating §4 of the act of 1917 relating to intoxicating liquors. Acts 1917 p. 15. The indictment charged that appellant at the county of Sullivan and the State of Indiana did, on May 24, 1918, unlawfully keep intoxicating liquor with intent then and there to barter, exchange, give away, furnish and otherwise dispose of the same in the State of Indiana in violation of the laws of the State of Indiana. A trial by jury resulted in a verdict of guilty. Omitting the formal parts, the verdict of the jury is in the words following: "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at a fine of \$300, and imprisonment in the county jail for a period of three months, 90 days in the penal farm." Appellant filed a motion for a *venire de novo* based on the ground that the verdict was so indefinite, uncertain, ambiguous and defective that no judgment could be rendered thereon. This motion was overruled and this ruling is assigned as error.

The court did not err in overruling this motion. Section 8 of the act of 1913, providing for the establishment of the Indiana State Farm, makes it the duty of

1. judges of circuit, superior and criminal courts to commit to that institution all male persons, above the age of commitment to the Indiana Boys' School, who have been convicted of the violation of any criminal law or of any ordinance the punishment for which formerly consisted of imprisonment in the county jail. Under the proviso of this section the court has a discretion to commit to either the county jail or the state farm, where the imprisonment is sixty days or less; but in this case, where the term of imprisonment was ninety days, it was the absolute duty of the court to commit the defendant to the state farm. In the light of this statute the verdict was not ambiguous or uncertain as to the place of imprisonment. §9926h Burns 1914, Acts 1913 p. 660, §8.

Error is also assigned on the action of the court in overruling the motion of appellant for a new trial, which was based on the grounds that the verdict is contrary to law, that the verdict is not sustained by sufficient evidence, and that the court erred in giving to the jury instruction No. 7.

The evidence most favorable to appellant shows that a few days before he was arrested he had a conversation with his son-in-law, in which a fishing trip was planned for the following Saturday, in which both of their families were to participate. It was agreed between them that they would take some beer and whisky along to be used by them and their families on that occasion, and appellant agreed to procure the liquor. His son-in-law gave him \$4, and appellant bought \$8 worth of liquor, using the money given him by his son-in-law and an equal amount of his own money. At the time he was arrested he had the liquor so purchased in his possession with intent to carry out the arrangement and for no

other purpose. For the purpose of the appeal the state admits that the evidence is undisputed, and the whole transaction occurred just as appellant said it did.

Under this state of facts appellant asserts that he acted as agent for his son-in-law in purchasing the portion of liquor intended for the use of him and his family; that the title therein passed to him at the time of the purchase and not to appellant, and that a future delivery to him would not constitute a sale, barter, exchange, gift, or a furnishing or other disposition of intoxicating liquor within the meaning of the act. He cites a number of cases to sustain his position. *State v. Cunningham* (1856), 25 Conn. 195; *DuBois v. State* (1888), 87 Ala. 101, 6 South. 381; *Garbracht v. Commonwealth* (1880), 96 Pa. 449, 42 Am. Rep. 550.

The state admits that, under the authorities cited, appellant could not be held guilty of an intent to sell, barter, exchange or give away the liquor in his possession, but it is asserted that the facts show that he intended to furnish or otherwise dispose of it.

The sole question for decision is thus presented. Do the facts show that appellant intended to furnish the liquor in his possession to others, within the meaning of the word as used in the act?

To furnish means to supply for use. It does not necessarily imply a change in title. The master may furnish tools to a workman for use, the title remain-

2. ing in the master. This common use of the term shows that the owner of property may furnish it to another by a mere delivery for use, but does a person furnish a thing to another by carrying and delivering to him an article of which he is already the owner? In deciding a question involving such a nice distinction in meaning, the definition of a word in the abstract is seldom of controlling influence. The court is generally required to consider the word in the concrete as used in

the statute to be construed, keeping in mind the general purpose of the act and the evils it was intended to remedy, as well as other rules of statutory construction.

The statute under consideration does not make it unlawful for a person to have intoxicating liquor in his possession in this state for his own use, and it expressly provides that it does not prohibit a person having liquor in his possession from giving it to a guest in his own home; but it was apparently the intention of the legislature to make it impossible for a person to obtain possession of liquor in this state. It seems to have been the purpose of the legislature to protect the people of the state from the temptation to drink intoxicating liquors by cutting off every avenue through which possession of such liquors could be obtained. Once a person has obtained possession and control of liquor, the statute does not make it unlawful to use it, but it does make it unlawful to furnish it to others except as specifically provided in the act.

In the case of *Commonwealth v. Davis* (1876), 75 Ky. (12 Bush) 240, the defendant below was charged with giving spirituous liquor to a minor. The evidence showed that the liquor was bought by the defendant with money furnished in whole or in part by the minor. The court said: "In its strict and primary sense the word 'give' signifies 'to confer or transfer without any price or reward; to bestow.' In its more enlarged sense it signifies 'to furnish, to supply;' and it was in this latter sense that the word was used in the statute.

"The statute was not enacted because the mere act of selling, loaning, or giving spirituous, vinous, or malt liquors to minors was in and of itself mischievous, but because such acts place the liquor in their hands and enable them to drink it, whereby they may become debauched and ruined."

In the case of *State v. Reese* (1912), 69 Wash. 437,

125 Pac. 363, the court construed a statute making it unlawful to sell, give away, dispose of, exchange or barter intoxicating liquor to an Indian. The court said: "It would seem that when the legislature used the words 'sell,' 'give away,' 'dispose of,' 'exchange,' and 'barter,' practically every imaginable method of an Indian acquiring intoxicating liquor was described. If the allegations of this information are true, then the defendant was the direct voluntary instrument of the disposition of the liquor to the Indian. Even assuming that the defendant was the mere agent of the Indian, and that the person from whom he purchased the liquor with the Indian's money had knowledge of the purpose of the purchase, yet the defendant acquired possession and control over the liquor, and this possession and control he transferred to the Indian. Surely by that act he *disposed* of the liquor. True, he did not 'sell' or 'give away' the liquor; but the very fact that the legislature used the words 'disposed of' in addition to 'sell' and 'give away' shows the intent of the legislature to include every possible subterfuge by which an Indian might acquire liquor through the voluntary act of another."

The same rule has been applied to the construction of statutes relating to dry territory where the acts forbidden by the statutes included the furnishing or otherwise disposing of intoxicating liquor. *State v. Hassett* (1891), 64 Vt. 46, 23 Atl. 584; *People v. Lapham* (1910), 162 Mich. 394, 127 N. W. 366.

Conceding that the title to the portion of the liquor for the son-in-law was in him from the time it was purchased and came into the hands of appellant, it

3. cannot be asserted that it had ever been in his possession or control. The purpose of the statute, as heretofore stated, was to protect the health and morals of the inhabitants of the state by keeping intoxicating liquors out of their possession and beyond their

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State v. Sarlin—188 Ind. 359.

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control. If appellant had delivered the liquor in accordance with his declared purpose, he would have been the active means by and through which the liquor in question would have been placed in the custody and control of persons whom the statute was enacted to protect. In the opinion of the court, the evidence is sufficient to sustain the verdict, and the verdict is not contrary to law.

In view of the evidence the instruction complained of was not prejudicial to appellant's rights.

Judgment affirmed.

NOTE.—Reported in 123 N. E. 691.

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### STATE OF INDIANA v. SARLIN.

[No. 23,521. Filed June 24, 1919.]

1. INTOXICATING LIQUORS.—*Keeping with Intent to Sell.—Construction of Statute.—Bonded Liquor.*—Section 4 of Acts 1917 p. 15, §8356d Burns' Supp. 1918, prohibiting the keeping of intoxicating liquor with intent to sell, etc., is not intended to apply to only those having bonded liquor, but is general in its application. p. 361.
2. INDICTMENT AND INFORMATION.—*Pleading Provisos and Exceptions.*—Where an exception is in a proviso, or in a subsequent section of the statute, it need not be pleaded; but exceptions which are a part of the definition of the offense must be pleaded. p. 362.
3. CRIMINAL LAW.—*Appeal.—Motion to Quash.—Presumptions.*—The trial court having sustained a motion to quash the affidavit, the Supreme Court must assume, even though no valid reason was presented by the appellee, that the court knew a valid reason, and, if the Supreme Court can discover one, it will sustain the action of the trial court, since it will not be presumed that the trial court did not take notice of more than was presented by the motion sustained. p. 362.
4. INDICTMENT AND INFORMATION.—*Certainty.—Use of Disjunctives.*—The rule that it is sufficient in criminal pleadings to charge the crime in the language of the statute does not mean that, where several acts connected by disjunctives are stated in a statute, the disjunctives may be used in charging the offense, since their use would render the pleading uncer-

tain; hence in charging a violation of that part of §4 of the Prohibition Act, Acts 1917 p. 15, making it unlawful "to keep intoxicating liquor with the intent to sell, \* \* \* furnish or otherwise dispose of the same," it is proper to charge conjunctively that one did unlawfully keep with "intent to sell \* \* \* furnish and otherwise dispose of the same." p. 362.

5. **INDICTMENT AND INFORMATION.—Intoxicating Liquors.—Affidavit.—Surplusage.**—Where the charge in an affidavit, under §4, Acts 1917 p. 15, for unlawfully keeping intoxicating liquor with intent to sell, etc., ended with the words "or otherwise dispose of or use," the affidavit was properly quashed under §2065, cl. 3, Burns 1914, Acts 1905 p. 584, §194, since the word *use* therein tended to show innocence, was neither in apposition to, nor explanatory of, that which preceded it, and therefore cannot be treated as surplusage. p. 363.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Prosecution by the State of Indiana against Charles Sarlin. From a judgment for the defendant, the state appeals. *Affirmed*.

*Ele Stansbury*, Attorney-General; and *Dale F. Stansbury*, for the state.

*W. G. Parry*, for appellee.

**TOWNSEND, J.**—Appellee was charged, under §8356d Burns' Supp. 1918, §4 of chapter 4 of Acts 1917 p. 15, with unlawfully keeping six pints of whisky with the intent to dispose of the same in violation of this section.

The trial court sustained appellee's motion to quash the affidavit, and the state appeals. So much of the affidavit as is necessary is as follows: "Did then and there unlawfully keep and have in his possession intoxicating liquor, to wit: six (6) pints of whiskey, with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same or use within the State of Indiana, etc." The affidavit then says that appellee was not the owner on April 2, 1918, was not a licensed pharmacist, wholesale druggist, manufactur-

ing chemist, or the owner, manager or operator of a public hospital or any person authorized by law to have intoxicating liquor in his possession.

We are not assisted by any brief from the appellee. We gather from the brief of the state and appellee's motion to quash that the only questions presented by appellee to the trial court were: (1) That §4, *supra*, had to do alone with persons having liquor in bond on April 2, 1918; (2) that the affidavit was bad because the exception in the proviso of the act was not pleaded. The section is: "That after the 2nd day of April, 1918, it shall be unlawful for any person, etc., \* \* \* to keep any intoxicating liquor, with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided. Provided, however, "it shall be lawful for any person who at the time of the taking effect of this act shall then be the owner of or in possession of spirituous, vinous or malt liquors previously manufactured in this state and which liquors, etc., \* \* \* shall then be under government bond in any bonded warehouse in this state, etc., \* \* \* to have, and keep in possession all such liquors until," etc.

The first part of this section is general in its application and makes it a crime for "any person to manufacture, sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor, or to keep any intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," etc.

It will be seen that it was the intention of the pleader to charge appellee with keeping intoxicating liquor with the "intent to sell," etc. This is the second offense

1. declared in the statute. This section of the statute is not intended to apply only to those having



bonded liquor, but is to be general in its application. Therefore appellee's first contention in his motion to quash is erroneous. His second contention that the exception contained in the proviso should have been pleaded is also erroneous. Where an exception is in a proviso, or in a subsequent section of the statute, it need not be pleaded. Exceptions which are a part of the definition of the offense must be pleaded. *Yazel v. State* (1908), 170 Ind. 535, 84 N. E. 972; *State v. Paris* (1912), 179 Ind. 446, 101 N. E. 497.

If the lower court had overruled this motion to quash and appellee were here questioning the correctness of that ruling, it would be proper for this court to sustain the ruling of the lower court on the theory that appellee had waived all objections to the affidavit except those pointed out; but, the court having sustained the motion to quash, we must assume, even though no valid reason was presented by appellee, that the court knew a valid reason, and, if we can discover one, it will be our duty to sustain the action of the lower court. It is not to be presumed that the trial court did not take notice of more than was presented by the motion which he sustained.

Appellee is charged with keeping six pints of whisky "with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same or use within the State of Indiana," etc. It has been decided

many times that it is sufficient to charge a crime in the language of the statute, but this statement of the law should not be taken literally. This does not mean that disjunctives in the statute may be used. The meaning of the statute must be gathered and the substantive words or their equivalents used. It has been repeatedly held by this court that, where a statute declares that it shall be unlawful for a per-

son to do this, or that, or that, it is sufficient to charge the several acts conjunctively, but it is not sufficient to charge them disjunctively because this renders the pleading uncertain. The defendant has a right to a direct and positive charge in order that he may plead and defend. Where a statute, as here, declares it unlawful "to keep intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," it is proper to charge that one did unlawfully keep with the intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same. That is to say, the state may charge conjunctively all of the acts following the intent. Bishop, New Crim. Proc. (2d ed.) §586; *Davis v. State* (1885), 100 Ind. 154; *State v. Stout* (1887), 112 Ind. 245, 13 N. E. 715; *Fahnestock v. State* (1885), 102 Ind. 156, 1 N. E. 372; *Regadan v. State* (1908), 171 Ind. 387, 391, 86 N. E. 449. It will therefore be seen that the court was correct in sustaining the motion to quash this affidavit because it was bad for uncertainty.

It will also be observed that the affidavit ends the charging part with "or otherwise dispose of or use."

If appellee were charged with unlawfully keep-

5. ing six pints of whisky with the intent to *use* the same, this would not charge a crime, unless perchance he were one who came within the provisos of this section—a question not here and not decided. It certainly is not unlawful for one outside of those having liquor in bond, so far as §4 of this statute is concerned, to *use* the liquor. Use is a broad word. He might drink it; he might serve it to his guests in his home. Now ordinarily, surplus words do not vitiate an affidavit or indictment; but they do vitiate it when they show innocence. One of the grounds for quashing an affidavit or indictment is that it contains that which is a justification or a bar. Subdivision 3, §2065

Burns 1914, Acts 1905 p. 584, §194. Therefore this affidavit pleaded too much and this cannot be treated as surplusage. It is neither in apposition to that which precedes, nor explanatory of it. We assume that the trial court saw these defects in this affidavit, and that its action was because of them.

The trial court was correct in sustaining the motion to quash, and the judgment is affirmed.

NOTE.—Reported in 123 N. E. 800. See under (2) 22 Cyc 344; (4) 22 Cyc 380; (5) 22 Cyc 368.

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FELKER ET AL. v. CALDWELL.

[No. 23,377. Filed June 25, 1919.]

1. OFFICERS.—*Claim to Office.—Injunction.*—Where the title to an office is clearly an unsettled question, a claimant to the office may be enjoined by one occupying the office under a claim of right until the former shall have established his title in an action at law. p. 366.
2. CONSTITUTIONAL LAW.—*Statutes.—Validity.—Presumption.*—An act of the legislature which has not been judicially declared unconstitutional or invalid is presumed to be a valid law. p. 367.
3. OFFICERS.—*De Facto.—Election under Invalid Act.*—One who is elected or appointed to an office under an unconstitutional statute, before such statute is adjudged to be so, is an officer *de facto*. p. 367.
4. STATES.—*State Statute.—Validity.—State Question.*—Whether an act of the state legislature is inhibited by the state Constitution is a state and not a federal question. p. 367.
5. STATES.—*Statute.—Interference With Interstate Commerce.—Effect of Federal Decision.*—An appointee of the Governor to the office of state supervisor of oil inspection, under Acts 1901 p. 516, §7890 Burns 1914, was not affected as to his title to such office by a decision of the federal court holding such act invalid as a revenue measure as to interstate shipments of oil. p. 368.
6. OFFICERS.—*De Facto.—Right to Injunctive Relief.*—Under Acts 1901 p. 516, §7890 Burns 1914, relative to oil inspection and the appointment of a supervisor thereof, though the duties

of such supervisor were extended and the mode of compensation was changed from a fee to a salary basis, the duties of the office were not so materially changed as to create a different office from that provided in the previous acts of 1881 and 1891 on the same subject; and the Governor's appointment of such inspector under the 1901 act was an appointment to an existing office and constituted the appointee, at least, a *de facto* officer, and a *de jure* officer if the act of 1901 was valid; hence such appointee was entitled to injunctive relief against a rival claimant, appointed by the state geologist under the act of 1891, who was interfering with the duties of the office. p. 369.

From Marion Circuit Court, (28,049); *Louis B. Ewbank*, Judge.

Action by Marion Caldwell against Adam H. Felker and others. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

*Myers, Gates & Ralston* and *Charles E. Cox*, for appellant.

*Ele Stansbury*, Attorney-General, *U. S. Lesh* and *John F. Robbins*, for the state.

MYERS, J.—On July 7, 1917, appellee brought this suit against appellants, Felker and his deputies, and thereafter such steps were taken and proceedings had that a temporary injunction was granted enjoining the appellants and all other persons assuming to act as deputies, or otherwise, from in any manner interfering with appellee as state supervisor of oil inspection, or his deputies in the discharge of their duties, "until such time as it shall first be established by the adjudication of a competent tribunal that said Adam H. Felker had a superior title to the said office of State Supervisor of Oil Inspection, or until the further order of this court." It further appears that appellee on June 22, 1917, was appointed by the Governor of the State of Indiana, state supervisor of oil inspection under the provision of an act of the general assembly approved

March 11, 1901. Acts 1901 p. 516, §7890 Burns 1914. He thereupon gave bond and qualified as required by law. On July 2, 1917, appellant Felker was appointed by the state geologist as state supervisor of oil inspection under the provisions of an act of the legislature. Acts 1891 p. 29. Felker gave bond and qualified as required by the law under which he claims to act, appointed deputies throughout the state, and proceeded to take steps to enforce the law relating to the inspection of oil, etc.

The errors here assigned on the rulings of the trial court challenge the legality of the order of the trial court granting a temporary injunction.

Appellants insist that a court of equity is without jurisdiction to grant injunctive relief in a case where it clearly appears that the real controversy involves the title to a public office. Appellee takes the position that by virtue of his appointment and commission he was a *de facto* officer acting under color of authority, and as such officer he was entitled to have the *status quo* preserved as against an adverse claimant who was interfering with him in the performance of the duties of such office, until such time as the title thereto could be determined in a proper proceeding for that purpose.

Appellants' insistence is not well taken for the reason that the title to the office of state supervisor of oil inspection was clearly an unsettled question, and

1. in such cases one claimant to the office may be enjoined by one occupying the office under a claim of right until the former shall have established his title in an action at law. *Parsons v. Durand* (1897), 150 Ind. 203, 49 N. E. 1047; *Brady v. Sweetland* (1874), 13 Kan. 41; *State, ex rel. v. Superior Court* (1897), 17 Wash. 12, 48 Pac. 741, 61 Am. St. 893; *Reemelin v. Mosby* (1890), 47 Ohio St. 570, 26 N. E. 717; *Rhodes v. Driver* (1901), 69 Ark. 606, 65 S. W.

106, 86 Am. St. 215; *Stenglein v. Saginaw Circuit Judge* (1901), 128 Mich. 440, 87 N. W. 449; *Guillotte v. Poincy* (1889), 41 La. Ann. 333, 6 South. 507, 5 L. R. A. 403; 2 Joyce, Injunctions §1380; 2 High, Injunctions (4th ed.) §1315.

In this state public offices are either constitutional or legislative. In this case the office in question is not a constitutional one; consequently it must be one created by the legislature or none exists. However, the power of the legislature to create it is not questioned, nor is there any constitutional objection urged.

In considering the questions here presented, the circumstances existing at the time the trial court gave its decision must not be overlooked. With this ob-

2. servation in mind, it will be seen that at that time the act of 1901, *supra*, was on our statute books, and presumably a valid law. *State, ex rel. v. Billheimer* (1912), 178 Ind. 83, 96 N. E. 801; *Hanly v. Sims* (1910), 175 Ind. 345, 93 N. E. 228, 94 N. E. 401; *Cincinnati, etc., R. Co. v. McCullom* (1915), 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E 1165. At least, if it was unconstitutional or invalid for any reason, it was not so judicially declared.

This court in the case of *Parker v. State* (1893), 133 Ind. 178, 200, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567, said: "It seems to be well settled that one who is elected or appointed to an office under an un-

3. constitutional statute, before it is adjudged to be so, is an officer *de facto*."

Appellee was appointed and qualified under the act of 1901. This act for more than sixteen years was acquiesced in by all parties concerned as well as the public generally. True, on June 27, 1917, the

4. District Court of the United States for the District of Indiana, on the ground that the act of

1901 was a revenue measure, enjoined appellee

5. from inspecting and interfering with oils which were interstate shipments. However this may be, the question of the validity of the act under which appellee was appointed was not then pending before, or determined by, any court of this state, nor had this court passed on the effect of the federal court decision. We take it for granted that the federal court did not pass on the question as to whether or not the act was inhibited by our state Constitution. That is a state question. *Ex Parte Spencer* (1912), 228 U. S. 652, 664, 33 Sup. Ct. 709, 57 L. Ed. 1010. While the decision of the federal court had the effect of excluding interstate shipments of oil from the operation of certain provisions of the statute under which appellee was acting, yet it is not our understanding that such decision in any wise affected appellee's title to the office of state supervisor of oil inspection. The question of title to the office is not here involved, and will not be considered as a question presented by this record. *Parsons v. Durand, supra*.

In 1881 (Acts 1881 p. 571), a general law on the subject of inspection of oils was enacted, and the Governor was thereby authorized to appoint for the term of two years a suitable person with certain specific qualifications to perform the duties required by that act. In 1891 (Acts 1891 p. 29), the general assembly expressly created the office of state supervisor of oil inspection, prescribed the duties thereof, fixed the compensation of such officer, and abolished the office known by the act of 1881 as state inspector of oils, and gave the appointive power to the state geologist, who was authorized to fill the office by appointment for a term of four years. This enactment was challenged and held valid by this court in the case of *State, ex rel. v. Hyde* (1891), 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79.

Looking to the law in force in 1891, on the subject now being considered, it will be seen that the two acts—1881 and 1891—together furnished the law at that time in this state on the subject of oil inspection. That law for a period of ten years thereafter was enforced by an officer characterized as “state supervisor of oil inspection.”

The 1901 act, *supra*, was entitled “An Act regulating the inspection of oils and other petroleum products, providing penalties for its violation and repealing all former laws, and laws in conflict therewith.” This act, as its title indicates, has reference to the manner of inspecting oils and other petroleum products only. It has no provision expressly creating an office, but provides that such inspection as therein designated shall be made by the state supervisor of oil inspection, an office theretofore created by positive legislative action, and at that time being administered by an incumbent who, so far as it appears from this act, was to continue in office until January 1, 1903, when by the provisions of this act the Governor was to appoint his successor and every four years thereafter. Under this act, the duties of the state supervisor of oil inspection were not materially different from those required of this officer under the act of 1881, except that his duties were extended to include the inspection of gasoline, petroleum-ether, or similar or like substances under whatever name called.

Under the former acts this officer was compensated by fees collected from those requiring his services, while

in the 1901 act he received a salary of \$2,500 per

6. year to be paid out of the state treasury. His salary since 1903 has been by the appropriation act increased to \$3,500 per year, with an addition of \$600 for office expenses, and in 1915 the legislature appropriated



\$500 for office expenses, \$500 for traveling expenses, and \$900 for clerk hire. Acts 1915 p. 349. A minor change was made in the appointment of deputies who were to receive only one-half of the fees provided for inspection, and the other one-half was to be paid to the state treasury for the benefit of the general fund of the state. Appellant calls our attention to these changes, and insists that they tend to show that the general assembly in passing this last act contemplated, and intended to create, another and different office from that created by the act of 1891. We are not convinced that this act should be so construed. We are not prepared to say that a mere change in compensating this officer from a fee basis to a salary basis is sufficient to create a new office, but, on the contrary, we are persuaded that the legislature, in re-enacting the act of 1881 relative to the duties of the inspecting officer and method to be followed by him in inspecting oil, gasoline, petroleum-ether and other petroleum products, and providing that the state supervisor of oil inspection shall perform these duties, did intentionally recognize the office created by the act of 1891 as an existing office, so that when the Governor of this state appointed appellee as the successor of the resigned incumbent, as shown by this record, the appointment was to a legally existing office, and appellee's possession of the books, papers and paraphernalia of the office under his appointment made him a *de facto* officer at least, and a *de jure* officer in case the act under which he received his appointment was valid. So that therefore when the proceedings in this case brought to the attention of the trial judge, acting as a chancellor, a state of facts showing an existing office with two claimants, one in possession performing the duties of the office, claiming his authority to act under an appointment authorized by the law not judicially declared invalid, and the other claiming the

right to administer the affairs of the same office by virtue of his appointment under another law, a *de facto* officer was shown on the part of the former entitling him to injunctive relief. *Johnston v. Jones* (1872), 23 N. J. Eq. 216.

In *Carleton v. People* (1862), 10 Mich. 249, it is said: "All that is required when there is an office, to make an officer *de facto*, is, that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer *de jure*." In the case of *Erwin v. Jersey City* (1897), 6 N. J. Law 141, 144, 37 Atl. 732, 733, 64 Am. St. 584, it is said: "When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so." See, also, *Ex Parte Parks* (1880), 3 Mont. 426, 428, 430; *Buck v. Hawley* (1906), 129 Iowa 406, 408, 105 N. W. 688.

Since the submission of this cause, the act of 1901 has been held invalid by this court in the case of *Caldwell v. State, ex rel.* (1918), 187 Ind. 617, 119 N. E. 999. That case was a proceeding in *quo warranto* to try the title to the office of state supervisor of oil inspection, wherein it was held that the act of 1881 is in force except as amended and modified by the act of 1891.

The question involved in this latter case was clearly for the law side of the court. When the question thus

presented was determined, the remedy invoked and granted in this case served its purpose, but it is necessary that the cause be sent back to the trial court for a final disposition in that court.

Our attention has been called to the case of *Norton v. Shelby County* (1885), 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, as authority for the proposition that there cannot "be a *de facto* office, under a constitutional government." In our view of the instant case, the question suggested is unimportant in the decision of this case, and we therefore express no opinion on it. However, in the case of *State v. Pooler* (1909), 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. 543, the question of whether or not there may be a *de facto* officer without a *de jure* office is thoroughly considered, as also the case of *State v. Carroll* (1871), 38 Conn. 449, 9 Am. Rep. 409, and the Norton case, the two leading cases often referred to in the books as sustaining the doctrine appellants would have this court announce. Each of these cases is analyzed, and the conclusion is reached that there can be no reasonable doubt that there may exist a *de facto* office as well as a *de facto* officer. See, also, *Lang v. Bayonne* (1906), 74 N. J. Law 455, 68 Atl. 90, 122 Am. St. 391, 12 Ann. Cas. 961, and note to same case, 15 L. R. A. (N. S.) 93; *State, ex rel. v. Bailey* (1908), 106 Minn. 138, 118 N. W. 676, 19 L. R. A. (N. S.) 775, 130 Am. St. 592, 16 Ann. Cas. 338. Judgment affirmed.

Lairy, C. J., and Townsend, J., dissent.

NOTE.—Reported in 123 N. E. 794. Officers: public, election or appointment under unconstitutional statute, as *de facto* officer, Ann. Cas. 1915C 498; who are *de facto* officers, 19 Am. Dec. 63, 29 Cyc 1391. See under (1) 29 Cyc 1418; (6) 29 Cyc 1416.

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Dunville v. State—188 Ind. 373.

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## DUNVILLE v. STATE OF INDIANA.

[No. 23,401. Filed June 25, 1919.]

1. **CRIMINAL LAW.—Manslaughter.—Definition.—Common-Law Construction.**—Since §2239 Burns 1914, Acts 1905 p. 584, §351, defining manslaughter, was adopted bodily from the common law, the legislature must have intended to adopt the common-law meaning of the words used. p. 375.
2. **HOMICIDE.—Manslaughter.—Wanton Recklessness.—“Unlawful Act.”—Proximate Cause.—Evidence.**—The words “unlawful act” contained in the statutory definition of manslaughter (§2239 Burns 1914, Acts 1905 p. 584, §351) are as broad in their content as they were at common law, and therefore include not only acts prohibited by statute but also conduct involving such wilfulness as to show a wanton recklessness as to the life and limb of others; but in either case, to support a conviction for manslaughter, the evidence must show that the unlawful act was the proximate cause of the death. p. 375.
3. **HOMICIDE.—Manslaughter.—Wanton Recklessness.—Intent.**—Where one acts in violation of a statute under circumstances showing reckless disregard for the life and limb of others, and this violation is the proximate cause of the death of another, the law implies an intent to commit involuntary manslaughter. p. 375.
4. **HOMICIDE.—Manslaughter.—Proximate Cause.**—In a prosecution for manslaughter, based on a violation of the Motor Vehicle Act (§10476 Burns 1914, Acts 1913 p. 779, §16), evidence showing that the accused, while on a motorcycle, ran into and killed a two-year-old child, who suddenly started across the street and stopped in front of the motorcycle, but which failed to show that such violation was the proximate cause of the death and, when considered as a whole, showed at most only negligence on the part of the accused is insufficient to support a conviction. p. 379.

From the Marion Criminal Court (46,374) ; *James A. Collins*, Judge.

Prosecution by the State of Indiana against James Dunville. From a judgment of conviction, the defendant appeals. *Reversed.*

*James M. Leathers*, for appellant.

*Ele Stansbury*, Attorney-General, and *Edward M. White*, for the state.

TOWNSEND, J.—Appellant was tried by the court, convicted of involuntary manslaughter and sentenced. The questions are presented by a motion for new trial: (1) finding not sustained by sufficient evidence; (2) finding contrary to law.

The indictment is in two counts, and it will be necessary to set out the substance only of so much of each count as will make understandable the questions discussed in this opinion.

The first count charges, in substance, that appellant drove a motorcycle north on Dearborn street, in the city of Indianapolis, at a speed in excess of twenty-five miles per hour, which was greater than was reasonable and prudent, having regard to the traffic and use of the street at the time and place; that this rate of speed was such as to endanger the life and limb of persons traveling on or using the street at the time and place; that as a result of this speed he lacked control of the motorcycle; that as a result of all of this he ran his motorcycle upon and against the person of Frances Held, inflicting injuries which caused her death on the following day.

So much of the substance of the second count as is necessary charges that he ran his motorcycle at a speed of thirty miles per hour on this street; that by reason of this speed he lacked control; that he operated his motorcycle without regard to the safety of other persons lawfully using said street; that as a result of his speed and lack of control he ran upon and against Frances Held, inflicting the injuries of which she died the following day.

The statute is: "Whoever unlawfully kills any human being without malice, express or implied, either volun-

tarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and on conviction, shall be imprisoned in the state prison not less than two years, nor more than twenty-one years." §2239 Burns 1914, Acts 1905 p. 584, §351. The above declaration of the crime of manslaughter is adopted bodily from the common-law definition. 4 Blackstone, Commentaries.

While it is true that all crimes in this state are statutory, yet the legislature, having adopted the common-law definition of manslaughter, must have in-

1. tended to adopt the content of each and every word in the act as defined at common law.

Appellant is here charged with involuntary manslaughter. Each count of the indictment charges a violation of the Motor Vehicle Act as to speed.

2. §10476c Burns 1914, Acts 1913 p. 779, §16. The two words "unlawful act" contained in the statutory definition of involuntary manslaughter must

3. be taken to be as broad in their content as they were at common law. These words embody more than an act prohibited by positive statute. One may be guilty of involuntary manslaughter if he conducts himself, in a given set of circumstances, with such wilful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons. It is also true that, if he is acting in violation of a positive statute under circumstances that show a reckless disregard for the life and limb of others, and this violation is the proximate cause of the death, the law then implies an intent to do the injury and makes him guilty of involuntary manslaughter. Whether the unlawful act committed is the one which we have first above indicated, or the second one pointed out, it is always necessary that the evidence show that the unlaw-

ful act is the proximate cause of the death. *People v. Barnes* (1914), 182 Mich. 179, 199, 148 N. W. 400.

The evidence in this case shows that Frances Held, the little girl who was killed, was two years and nine months old. The evidence shows that appellant on September 8, 1916, between 5:30 and 6 o'clock, was driving his motorcycle north on Dearborn street, in the city of Indianapolis; that he ran upon and against Frances Held in the block between Pratt and St. Clair streets. It is not definitely disclosed by the evidence where in the block this accident occurred, other than that the little girl came into the street opposite the Reynold's sidewalk. Witnesses testified to the speed of appellant at points not definitely disclosed by the evidence, but shown to be from a half block to  $2\frac{1}{2}$  blocks south from the scene of the accident. The evidence does not disclose anything as to the condition of the traffic on the street, or the length of block or blocks talked about by the witnesses. In fact, it affirmatively appears from the evidence, if anything, that the only person upon the street within that block was the little child, Frances Held; and the evidence shows that she ran suddenly across the street and stopped immediately in front of appellant's motorcycle; that he tried to avoid her; that he tripped his machine down, throwing his companion, who was on the rear seat, against the curb, rendering him unconscious; that this all occurred so suddenly that he did not have time to shut the engine off, and it drove the motorcycle, while resting upon its pedal, across the street and kept running until appellant went over and shut it off. One witness testified that the child, Frances Held, came from the west side of the street. It is not made to appear how far away appellant was when she came, or whether he was any appreciable distance south of where the accident occurred. Another witness testified that she came from the east side of

the street, but it is not made to appear how far appellant was away when she came, or what opportunity he had to see her. All the witnesses agree that the accident occurred near the east curb of the street at a point on the street where appellant had a right to be in going north. It is not shown how far away the witness was who testified that the child came from the west side of the street, nor is it made to appear that appellant had the same opportunity to see her, if she came from that side of the street, that this witness had. It is not shown how far the witness was away who testified that the child came from the east side of the street, nor is it made to appear that appellant had the opportunity to see the child that this witness had. There is not a syllable of evidence in the record as to the width of the street; no evidence as to whether the child came from a hidden position with reference to appellant. All of the witnesses who testified about the accident appear to have been south on the street anywhere from a half block to  $2\frac{1}{2}$  blocks—how far from the point of accident is not further disclosed. There is not a syllable of evidence in the record as to how long the block is where the accident occurred.

The testimony of the appellant is that he had just passed around a wagon which was standing on the east side of the street; that as he passed around this wagon he shut off the power on his motorcycle; that he was back to his position on the east side of the street, and had proceeded about 200 feet when he discovered immediately in front of him this child, who stopped right in front of his wheel. He says that he tried to avoid her but she stopped in front of his wheel. All of the witnesses agree that he tried to avoid her, but she ran suddenly into the street and stopped in front of his wheel. The testimony as to his speed at the south corner of this block and for two blocks farther south is rather re-



mote, considering the fact that nothing appears to show how far these points were from the scene of the accident. It is a matter of common knowledge that motor vehicles may be accelerated and retarded very rapidly. But whatever may be said as to the inferences that the lower court drew from the testimony about appellant's speed, and whether the lower court was warranted in drawing the inference that he was exceeding the speed limit of fifteen miles per hour at the time the child was struck, becomes material only when it is shown that the accident would not have occurred just as it did, had appellant been going at a lawful rate.

Counsel for the appellant, in a very able brief in which many authorities are collated, sets out the law of involuntary manslaughter. Counsel for the state admit that this exposition of the law is a correct one, but they wholly deny that the conduct of this child in suddenly coming into the street has anything to do with this case. Their contention is, if we understand them, that if it was shown that appellant was violating the speed law, and that, as some of the evidence shows, he was looking back, or looking to the side at some men who attracted his attention on the east side of the street, and for that reason did not see the child, that he is therefore guilty of manslaughter. Counsel for the state say that contributory negligence of the child has nothing to do with the case. This is true in a sense. It is not a question of contributory negligence. Of course, we know that a child two years and nine months old is not *sui juris* and cannot be guilty of negligence, or contributory negligence, in the ordinary sense of those terms; but the conduct of this child, in the circumstances shown by the evidence, is just as cogent in breaking down the intent which the law imputes to appellant after the event, as like conduct on the part of an adult in like circumstances would be in repelling such imputation. It

is not a question of contributory negligence, but it is one of proximate cause.

So the question is, Did appellant conduct himself at the time and place in such manner as to show a wilful and wanton disregard for the rights of others, from which the law infers an intent to cause death, and did his conduct cause the death? It will be conceded that, if appellant were driving his motorcycle down the street, and the facts showed that he saw, or had reason to know that little children were upon the street who were of such tender age as not to know the dangers or heed warning signals, it would be his duty so to conduct himself as not to injure them, and in the event that he wilfully and wantonly disregarded that duty and his conduct resulted in the death of one of them, he would be guilty of involuntary manslaughter. Circumstances could well be conceived in which he would be guilty of involuntary manslaughter if he drove the motor vehicle even at one mile an hour in a street crowded with little children—or even crowded with adults.

The most the evidence discloses is negligence on the part of appellant. For aught that appears in this case, the proximate cause of Frances Held's death was

4. the fact that she ran in front of appellant's motorcycle and suddenly stopped. For aught that is shown by the evidence, the accident would have occurred had appellant been proceeding in the most careful manner.

An apt authority involving most, if not all, of the salient principles here discussed is found in *People v. Barnes*, *supra*.

The finding of the court is not sustained by sufficient evidence, and is therefore contrary to law. The judgment is reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 123 N. E. 689. Criminal law, adoption in relation to crimes, Ann. Cas. 1913E 1246, 21 Cyc 735. See under (2) 21 Cyc 771.

### BENNETT v. STATE OF INDIANA.

[No. 23,513. Filed June 26, 1919.]

1. **INDICTMENT AND INFORMATION.—Assault and Battery with Intent.—Motion to Quash.**—A motion to quash an indictment for assault and battery with intent to commit murder, when directed to the whole indictment, should be overruled where the assault and battery is sufficiently charged. p. 381.
2. **HOMICIDE.—Appeal.—Defective Indictment.**—One who is charged with assault and battery with intent to commit murder, and who is convicted of assault and battery only, cannot justly complain that the indictment does not sufficiently charge the felonious intent to murder. p. 382.
3. **CRIMINAL LAW.—Appeal.—Presumptions.**—The burden of making an affirmative showing of error is on the complaining party, and, in the absence of such showing, the court on appeal, as a general rule, will indulge all reasonable presumptions in favor of the rulings of the trial court. p. 382.
4. **CRIMINAL LAW.—Appeal.—Presumptions.—Instructions.**—Where all the instructions are not in the record and the defendant complains that, after proper and timely request to instruct the jury in writing, the judge read the indictment and the section of the statute defining the offense charged without copying them into the written instructions, it will be presumed on appeal, in the absence of affirmative showing to the contrary, that the judge complied with the request, either by copying the parts objected to into the instructions before reading them, or, on objection being made, by rereading the same after copying them into the instructions. p. 382.
5. **CRIMINAL LAW.—Appeal.—Record.—Motion for New Trial.**—Alleged errors that the verdict of the jury is contrary to law and that it is not sustained by the evidence, assigned as grounds for a new trial, present no question for review in the absence of the evidence from the record. p. 386.
6. **CRIMINAL LAW.—Appeal.—Briefs.**—Alleged error of the court in finding for the state on the defendant's plea in abatement presents no question for review where such defendant fails to set out in his brief a copy, or the substance, of such plea and fails to show in the brief what disposition was made thereof. p. 386.

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Bennett v. State—188 Ind. 380.

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7. CRIMINAL LAW.—*Plea.—Standing Mute.*—Where the defendant stands mute or refuses to plead to the charge, it is the duty of the court to enter a plea of not guilty. p. 386.

From Greene Circuit Court; *Thomas Van Buskirk*, Special Judge.

Prosecution by the State of Indiana against Stanley Bennett. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Charles C. Whitlock* and *Webster V. Moffett*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

WILLOUGHBY, J.—This was a prosecution against appellant and another by indictment under §2240 Burns 1914, Acts 1905 p. 584, §352, for assault and battery with intent to commit murder. The appellant was tried separately by jury, and a verdict was rendered finding him guilty of assault and battery only. Judgment was rendered on the verdict and defendant appeals. The errors relied on for reversal are: (1) Error in overruling appellant's motion to quash the indictment. (2) Error in the court overruling appellant's motion for a new trial.

The indictment, omitting the formal parts and signature, is as follows: "That at Green County, in the State of Indiana, on the 4th day of December, 1917, one Stanley Bennett and William Stevenson did then and there unlawfully and feloniously, and in a rude and insolent and angry manner touch, beat, strike, kick and wound Will R. Vosloh, with the felonious intent, then and there and thereby to kill and murder said Will Vosloh."

A motion to quash was directed to the whole indictment. If it was good as an indictment for assault

1. and battery only, the motion was correctly over-

ruled. *Greer v. State* (1875), 50 Ind. 267, 19 Am. Rep. 709; *McGuire v. State* (1875), 50 Ind. 284; *Stucker v. State* (1908), 171 Ind. 441, 84 N. E. 971.

Appellant insists that the indictment does not correctly charge the felonious intent to murder. The indictment sufficiently charges the commission of

2. the crime of assault and battery as defined by §2242 Burns 1914, Acts 1905 p. 584, §354, and, as the accused was convicted of assault and battery only, he is not in a position to complain or insist that the indictment does not sufficiently charge the felonious intent. Having been convicted of assault and battery only, the sufficiency of the indictment as to the intent presents a moot question which we are not required to decide. *Stucker v. State*, *supra*. *Parks v. State* (1902), 159 Ind. 211, 215, 64 N. E. 862, 59 L. R. A. 190.

There is no attempt to bring any evidence into the record. There is no bill of exceptions purporting to contain the evidence or any part of it. There is in the record a bill of exceptions containing certain instructions given by the court and certain instructions requested by the defendant and refused by the court, but it does not appear from said bill of exceptions that it contains all of such instructions given or tendered and refused.

Appellant claims that the court erred in this, that the appellant made a proper and timely motion to require the court to instruct the jury in writing,

3. but that, notwithstanding such request, the judge read, in giving his instructions in the case, the original indictment, and in another instruction he

4. read §2240 Burns 1914, *supra*, from the printed volume. The bill of exceptions does not show affirmatively that the judge did not copy said indictment and §2240, *supra*, into his written instructions filed in the case. For aught that appears in the bill of excep-

tions, he may have had them copied in his instructions before reading, or, when objection was made, he may have then copied said statute and indictment into his instructions, and then reread them. In *Smurr v. State* (1883), 88 Ind. 504, cited by appellant, the court said: "It is proper, of course, for the court to make extracts, which are law and applicable to the case, from any law book, and to copy the same in its written charge and to read the charge containing such extracts to the jury." The bill of exceptions does not show that this was not done. Therefore we must presume that it was done. As a general rule the appellate court, in the absence of a showing in the record to the contrary, will indulge all reasonable presumptions in favor of the correctness of the judgment or rulings of the trial court, and will presume that the proceedings had in the progress of the cause were regular and free from error. In order to overcome such presumption, error must affirmatively be shown by the record, and the burden of so showing it is on the party, usually defendant, complaining of the error. 17 C. J. 213-215; *Bader v. State* (1911), 176 Ind. 268, 94 N. E. 1009; *Woodward v. State* (1910), 174 Ind. 743, 93 N. E. 169; *Campbell v. State* (1897), 148 Ind. 527, 47 N. E. 221; *Duncan v. State* (1913), 110 Ark. 523, 162 S. W. 573; *Niswonger v. State* (1913), 179 Ind. 653, 102 N. E. 135, 46 L. R. A. (N. S.) 1. In the absence of an affirmative showing of error, the presumption is that the ruling of the trial court was correct. *Malone v. State* (1912), 179 Ind. 184, 100 N. E. 567; *Woodward v. State*, *supra*; *Campbell v. State*, *supra*.

In *Hollon v. State* (1917), 186 Ind. 374, 114 N. E. 5, the court said: "Certain questions are sought to be presented as to instructions given and refused, but it does not appear from the bill of exceptions containing such instructions whether it contains all of the instruc-

tions in the case. As said in *State v. Winstandley* (1898), 151 Ind. 495, 496, 51 N. E. 1054: 'When, in a criminal case, it is not affirmatively shown by the bill of exceptions that it contains all the instructions given by the court to the jury, this court must presume that such bill of exceptions does not contain all the instructions given. *Cooper v. State*, 120 Ind. 377, 383, 384. In such case the presumption is that the substance of the instructions asked was embraced in the instructions given by the court which are not contained in the bill of exceptions, and that, if any instructions given by the court, and set out in the bill of exceptions, are erroneous, they were corrected or withdrawn by other instructions given by the court, and not set forth in the record.'"  
*Pence v. Waugh* (1893), 135 Ind. 143, 34 N. E. 860; *Board, etc. v. Nichols* (1894), 139 Ind. 611, 38 N. E. 526; *Musgrave v. State* (1892), 133 Ind. 297, 32 N. E. 885; *Forsyth v. Wilcox* (1895), 143 Ind. 144, 41 N. E. 371.

In *Robb v. State* (1896), 144 Ind. 569, 43 N. E. 642, complaint was made of misconduct of the prosecuting attorney in his opening statement to the jury, and this court held that it would presume that the trial court, in its instructions, withdrew any such misstatements of a prejudicial character, and directed the jury to disregard them, for the reason that all the instructions given were not in the record. The court in that case, at page 572, said: "However, it is the duty of this court to indulge all reasonable presumptions in favor of the action of the trial court, and in doing so in this instance we must presume, the contrary not appearing, that the court in its charges to the jury withdrew any misstatements, of a prejudicial character, and directed the jurors to ignore them." If the presumption in such a case is that the trial court withdrew the improper statements of the prosecuting attorney and directed the jury to disregard

them, it certainly follows that, if the instructions are not all in the record, and any instruction contained therein is erroneous, it will be presumed, not only that the same was corrected, or the defect therein supplied by other instructions given, and omitted from the record, but that the same was withdrawn, and the jury directed to disregard it, if such presumption is necessary to prevent a reversal of the cause.

Applying the same reasoning to the case now before the court, the court must presume, nothing in the record affirmatively appearing to the contrary, that the court withdrew the oral instructions, claimed by appellant to have been given, and substituted therefor written instructions, and that, when objection was made to the reading of §2240 Burns 1914, *supra*, the court copied such section into its instructions and reread it, and that the indictment was copied into its written instructions as a part thereof.

Judge Elliott, in his work on Appellate Procedure, §709, said: "If the appellate tribunal is compelled to resort to presumptions it will choose that which sustains the proceedings of the trial court and reject that which would overthrow them. If the condition of the record is such as to require the higher court to act upon a presumption it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted."

In this case, the bill of exceptions failing to show affirmatively that the court did not comply with the written request of the parties that instructions be given in writing, we must presume that the trial court complied with the law in that particular. In the absence of the evidence, and the bill of exceptions containing the instructions not showing affirmatively that it contains all the instructions given, no question is presented to this



court on giving or refusing instructions. *Hollon v. State, supra*; *State v. Winstandley, supra*.

In his motion for a new trial, appellant says the verdict of the jury is contrary to law and the verdict of the jury is not sustained by the evidence, but, in the

5. absence of the evidence, we cannot consider either of these alleged errors. §2165 Burns 1914, Acts 1905 p. 584, §289.

Appellant alleges that the court erred in finding for the state on appellant's plea in abatement to the indictment, but he does not set out in his brief any

6. copy of the alleged plea in abatement, or state the substance of it, and there is nothing in said brief to show what disposition was made of said plea.

7. He does not disclose whether it was disposed of by demurrer, or whether an issue of fact was formed and evidence heard. Under such circumstances, nothing is presented to this court for decision concerning said plea in abatement. The burden is on the appellant to show error in the record and proceedings of the trial court. *Malone v. State, supra*. Appellant contends that the court erred in entering a plea of "not guilty" for defendant, Stanley Bennett, when said defendant stood mute in court, and in forcing said defendant to trial in said court without first rendering judgment upon said defendant's plea in abatement and requiring defendant to plead over to said indictment. In this contention appellant is wrong. If a defendant stand mute or refuse to plead to an indictment or affidavit, a plea of not guilty must be entered by the court, and the trial proceed. §2072 Burns 1914, Acts 1905 p. 584, §201; *Weaver v. State* (1882), 83 Ind. 289.

No error appearing, the judgment of the trial court is affirmed.

NOTE.—Reported in 123 N. E. 797.

## KOEHLER v. STATE OF INDIANA.

[No. 23,387. Filed April 25, 1919. Rehearing denied June 26, 1919.]

1. **INDICTMENT AND INFORMATION.—Venue.—Sufficiency.**—The omission of the name of the state from the body of an indictment does not render the pleading fatally defective where the name thereof appears in the caption, since the caption is part of the pleading. p. 388.
2. **RAPE.—Evidence.—Guilty Knowledge.**—Though, in a prosecution for rape upon a girl under the age of consent, it is not incumbent upon the state to prove that the defendant had knowledge of the girl's age, testimony of the mother of the girl as to a conversation had with the defendant, or in his presence, regarding the daughter's age was not objectionable, though the conversation took place before the offense was committed, since it tended to show guilty knowledge. p. 390.
3. **WITNESSES.—Contradictory Statements.—Right to Explain.**—In a statutory rape case, it was not error for the court to permit the prosecuting witness to explain why she wrote a letter to the defendant, which had been introduced by the defense, and which tended to exonerate the defendant and to contradict her testimony, since a witness has the right to explain or reconcile inconsistent statements and to have the explanation submitted to the jury. p. 390.
4. **CRIMINAL LAW.—Rape.—Evidence.—Admission.**—In a statutory rape case, the court properly permitted a witness to detail a conversation had with the defendant before the offense was committed, in which the witness told the defendant that he had no business to go with the prosecuting witness and, in reply to which, the defendant said that they would not catch him and that it would be all right if they should, such testimony being competent to show the acquaintance, associations and familiarity of the parties. p. 390.
5. **CRIMINAL LAW.—Admission of Evidence.—Objections.**—Even if it was improper for the prosecuting attorney to ask the defendant on cross-examination whether he was thrown out of certain lodges for immorality, there was no error in admitting it over the objection that the question was improper "for the reason that secret societies are not subject to the same sort of investigations as persons" and their laws "might be different from the laws of the courts \* \* \* with right of appeal." p. 391.
6. **CRIMINAL LAW.—Appeal.—Scope of Review.**—Where there are specific objections to the admission of evidence, the impli-

cation follows that there are no others, or, if others, that they are waived; and a party may not make one objection in the trial court and another on appeal. p. 391.

7. **CRIMINAL LAW.—Instructions.**—An instruction in a rape case that, if the jury were convinced beyond a reasonable doubt that the defendant was guilty of some one of the offenses included in the indictment, but entertained a reasonable doubt as to which offense he was guilty of, then they should find him guilty of the lowest offense, was not erroneous, since it was substantially in the language of the statute, and for the further reason that other instructions on the subject so clearly advised the jury that it could not have been misled. p. 392.

From Allen Circuit Court; *William H. Eichhorn*, Special Judge.

Prosecution by the State of Indiana against John H. Koehler. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Samuel M. Hench*, *W. C. Ryan* and *L. H. Dunten*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings*, *Dale F. Stansbury* and *Franklin A. Emerick*, for the state.

**MYERS, J.**—Appellant was tried and convicted upon an indictment returned by a grand jury of Allen county charging him with carnal knowledge of a female child under sixteen years of age. Acts 1907 p. 85, §2250 Burns 1914.

In this court the only errors well assigned and not waived are: (1) That the trial court erred in overruling his motion to quash the indictment and each count thereof; (2) that the trial court erred in overruling his motion for a new trial.

The only point made against each count of the indictment is that it fails to state that the county of Allen is in the State of Indiana. This identical ques-

1. tion has been decided by this court against appellant's contention in *Anderson v. State* (1886),

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Koehler v. State—188 Ind. 387.

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104 Ind. 467, 4 N. E. 63, 5 N. E. 711. In that case it was held that under our Criminal Code the caption and upper marginal title is to be considered a part of the indictment.

The indictment in the case at bar with reference to the caption and marginal title reads as follows:

"State of Indiana, Allen County, SS:

"In the Allen Circuit Court.

"November Term 1916.

"The State of Indiana

vs.

Indictment for Rape.

John H. Koehler

"The grand jury of the County of Allen upon their oath, do present that on the — day of August, 1916, John H. Koehler at the County of Allen in the State of Indiana \* \* \*."

It is perfectly clear from that part of the indictment quoted that it was returned into the Allen Circuit Court by a grand jury of Allen county which is stated in the caption to be in the State of Indiana. The offense is directly charged to have been committed in "Allen county, Indiana." The objection of appellant is not well taken, and the motion to quash was properly overruled. *Winegardner v. State* (1913), 181 Ind. 525, 104 N. E. 969; *Long v. State* (1877), 56 Ind. 182, 26 Am. Rep. 19; *Turpin v. State* (1881), 80 Ind. 148; *Hawkins v. State* (1894), 136 Ind. 630, 36 N. E. 419.

Appellant in support of his motion for a new trial has assigned many reasons, nearly all of which pertain to the admission or rejection of evidence at the trial. A number of these specifications present no question, therefore we shall give attention only to such specifications as are reasonably before the court.

It is first contended that the court erred in permitting

the mother of the prosecuting witness to testify to a conversation had with the accused, or in his presence,

2. as to the girl's age, in which she said that she was keeping her daughter back from high school. The question was objected to on the ground that it called for a conversation prior to the time of the alleged offense; that it was in the nature of hearsay, and that her age at that time was immaterial. The witness had testified that the prosecuting witness was fourteen years of age at the time of the trial, and from the record we learn the trial was begun on June 18, 1917. It appears that the conversation inquired about took place after February, 1915, and before the offense was committed in August, 1916. This testimony tended to show knowledge on the part of the defendant of the girl's age, a fact not incumbent on the state to prove, yet it was proper for the purpose of showing guilty knowledge. Appellant's objection was not well taken.

It is further insisted that the trial court erred in permitting the prosecuting witness to explain why she wrote a certain letter to the appellant which had

3. been read in evidence on the part of the defense.

The effect of this letter was to exonerate appellant from the offense for which he was then on trial, and to contradict the evidence of the prosecuting witness given at the trial. It is clearly the right of a witness to explain or reconcile any inconsistent utterances as well as the situation or condition under which such contradictory statements are made, and to have such explanations submitted to the jury. *Underhill*, Crim. Ev. (2d ed.) §238; *Buehner v. Feulner* (1904), 164 Ind. 368, 374, 73 N. E. 816.

Appellant insists that the court erred in permitting a witness to detail a conversation had with the appellant, wherein she (witness) stated that she (witness)

4. told the appellant that he had no business to go

with the prosecuting witness; that they would get caught, and that appellant said they wouldn't catch him, and if they got caught it would be all right with him. The objection urged to the question calling for this testimony was that this conversation took place prior to the time fixed when the offense was committed; that it raised a collateral issue. While this testimony was in the nature of an admission, it was competent for the purpose of showing the acquaintance, associations and familiarity of the parties.

Appellant also complains of the action of the trial court in permitting the prosecuting attorney to ask him on cross-examination whether he was thrown out

5. of two certain lodges for immorality, and in requiring him to answer that question. Appellant objected to this question "for the reason that
6. secret societies are not subject to the same sort of investigations as persons. As to whether he was expelled from any secret society in which they have laws that might be different from the laws which govern the courts of justice in the State of Indiana with its right of appeal, we claim he should not have asked that question." These are specific objections to the admission of evidence and from which the implication follows that there are no others, or, if others, that they are waived. *Bass v. State* (1894), 136 Ind. 165, 36 N. E. 124; *Pichon v. Martin* (1904), 35 Ind. App. 167, 73 N. E. 1009. In this court appellant insists that the question and answer tended to impeach the witness, or at least it tended to affect his credibility before the jury. The law is well settled that a party will not be allowed to make one objection to the admissibility of evidence in the trial court and another in this court. *Van Spanje v. Hostettler* (1918), — Ind. App. —, 119 N. E. 725; *Cleveland, etc., R. Co. v. Woodbury Glass Co.* (1918), — Ind. App. — 120 N. E. 426 434. The question

raised must be determined upon the record as made in the trial court. That record, as we see it, does not raise the question discussed here. While we do not hold that the question called for admissible evidence, yet we do hold that there was no error in admitting it over the objections interposed.

Error is claimed on the giving of instruction No. 13 by the court on its own motion. This instruction in

substance told the jury that, if they were convinced beyond a reasonable doubt that the defendant was guilty of some one of the offenses included in the charge contained in the indictment, but entertained a reasonable doubt as to which of the several offenses he was guilty of, then they should find him guilty of the lowest offense. This instruction was substantially in the language of §2137 Burns 1914, Acts 1905 p. 584, §261, and there was no error in giving it. In addition it may be said that the court in other instructions clearly advised the jury in regard to the lower grades of offenses included in the charge of rape. Taking the instructions as a whole, the jury could not have been misled by the questioned instruction. *Coolman v. State* (1904), 163 Ind. 503, 72 N. E. 568; *Newport v. State* (1895), 140 Ind. 299, 39 N. E. 926.

After a careful consideration of the record in this case, we are fully convinced that appellant had a fair trial, and that his alleged errors do not warrant us in granting him a new trial. Judgment affirmed.

NOTE.—Reported in 123 N. E. 111. See under (1) 22 Cyc 312; (2) 33 Cyc 1473; (3) 40 Cyc 2782.

## CROMER ET AL. v. BRIDENBAUGH ET AL.

[No. 23,147. Filed April 24, 1919. Rehearing denied June 26, 1919.]

1. DRAINS.—*Construction.—Making Old Drain Part of New.—Sufficiency of Report.—Petitioners' Theory.—Effect on Appeal.*—Where a proceeding for the construction of a drain in the course of an old dredged ditch was dismissed on the ground of remonstrance that the work as reported was insufficient, and the record shows, by statements of the court and the petitioners' counsel, that the cause was tried on the theory that the report called for a new tile drain supplanting the old ditch, the petitioners' contention on appeal that, though the tile as specified would be insufficient, there were sufficient specifications reported to show that the new drain was to be supplemental to the old and that the latter was to remain open as it was at the time of the filing of the report, is of no avail; especially is this true where the record shows that such specifications relied upon by the petitioners were either required by statute, or were necessary, for proper construction of a new drain, and that the old ditch, through neglect, had become full in places and had no definite channel, but that no specifications were reported for its improvement, since under such circumstances the law would not permit the old ditch to remain an open channel without definite specifications as to its width, depth and slope. pp. 395, 396.
2. DRAINS.—*Commissioners' Report.—Dismissal.—Amendment.*—Where a drainage proceeding was dismissed on the ground that the proposed work as reported by the commissioners was insufficient to drain the land, a request to amend the report, made twenty-three days after dismissal, was too late. p. 398.
3. DRAINS.—*Commissioners' Report.—Sufficiency.—Amendment.*—Where a report of drainage commissioners called for construction of a new tile drain in the course of an old dredged ditch that was full in places and had no definite channel, and the court found that the proposed work as reported was insufficient, a request to amend the report so as to permit the old ditch to be left open as it then was as part of the new drain, without specifications as to its width, depth and slope, was too indefinite. p. 399.
4. EVIDENCE.—*Expert Testimony.—Knowledge.*—Witnesses who had any knowledge relative to the sufficiency of a proposed drain were properly permitted to testify as experts, the extent of their knowledge being a question of the weight, and not of the admissibility, of their testimony. p. 399.



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Cromer v. Bridenbaugh—188 Ind. 393.

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5. EVIDENCE.—*Expert Testimony.—Drains.*—In the trial of a remonstrance to a drainage proceeding, the exclusion of the testimony of a commissioner, who was not familiar enough with his own report to know the sizes of the tile provided for therein, was not error, since the report itself was in evidence and in that the witness had given his verified opinion as to the efficiency of the proposed drain. p. 399.

From the Pulaski Circuit Court; *W. C. Pentecost*, Judge.

Proceedings by Jacob Cromer and others for the construction of a drain, in which Otto Bridenbaugh and others filed remonstrance. From an order dismissing the proceedings, the petitioners appeal. *Affirmed.*

*Reidelbach & Reidelbach, John M. Spangler and Myers, Gates & Ralston*, for appellants.

*Long, Yarlott & Souder, Horner & Thompson and James W. Noel*, for appellees.

TOWNSEND, J.—Appellants filed their petition in the Pulaski Circuit Court for an open dredged ditch. This ditch lies wholly within the county. Commissioners were appointed and made their report. They afterwards amended this report. The cause was tried and proceedings dismissed on the tenth statutory ground of remonstrance to the amended report. Acts 1907 p. 508, §4, §6143 Burns 1914. The trial court construed the commissioners' report to provide for an underground tile drain in the main ditch from station 0 to station 226 plus 74 feet.

It transpires from the evidence that this main ditch, all but about a mile at the upper end thereof, lies in the channel of an old dredged ditch that was con-

1. structed in 1897, commonly known as Mud Creek.

It is appellants' contention that they should not have been defeated on this cause of remonstrance, for the reason that the report of the commissioners con-

templated that Mud Creek should be left open as it was at the time of the filing of the report.

The report provided that in this main ditch from stake "0" to 30 there should be a 10-inch tile; from stake 30 to 75 there should be a 12-inch tile; from stake 75 to stake 100 there should be a 14-inch tile; from stake 100 to 144 there should be a 16-inch tile; from stake 144 to stake 226 plus 74 feet there should be a 24-inch tile; from stake 226 plus 74 to stake 243 to be an open ditch.

Appellants seem to admit that, under the evidence, a 24-inch tile would not be sufficient for the drainage in question, unless Mud Creek is left open above the tile.

There were numerous branches leading into this main ditch, and the proposed drainage was to take care of about 2,000 acres; but appellants claim that there is sufficient in the report to show that the drainage commissioners intended that Mud Creek should remain open to take care of overflow waters. They base this contention upon the proposition that the report of the commissioners provided for a concrete bulkhead at station 226 plus 74 feet, which was concave at the top, being twelve feet high at the ends and seven feet high in the center, to conform to the bottom of the old ditch, Mud Creek; also on the proposition that the tile were to be covered level with the bottom of Mud Creek; also on the proposition that the report required the contractor to remove all trees and shrubs to a distance of twenty-five feet on each side of the drain.

When the first witness was put upon the stand by the remonstrators, in the course of his examination a controversy arose between counsel, on an objection,

1. as to the relation that the proposed tile drain sustained to Mud Creek, remonstrators' attorney asking the witness concerning the cleaning of Mud Creek. Whereupon the trial court remarked: "What

has the cleaning of Mud Creek got to do with it?" And shortly thereafter, attorney for the petitioner added to the objection to the question the following: "I want to add an objection that the proposed ditch is a new ditch." Thus it is seen that at the very outset of the trial the court indicated his view of the commissioners' report and counsel for the petitioners adopted that view in this objection. It will hardly do to say that petitioners tried this cause on the theory that this tile drain was supplemental to Mud Creek; or that Mud Creek was to remain as an adjunct to this drain. It seems quite apparent from the record that the case was tried on the theory that this was a new system of drainage completely supplanting the old dredged ditch that was constructed in 1897, which the evidence showed was tramped full in places and had grown up to grass and weeds and brush, had no definite channel. In some places it was very wide and very shallow, in other places quite deep, varying from a few inches in depth to several feet in depth, and varying in width from a few feet to from twenty-five to thirty feet at different points.

It seems from the record that petitioners were proceeding upon the theory that the report called for a tile drain down to station 226 plus 74 feet, and that

1. this drain was to completely supplant the old open ditch; that only after they were met by evidence that the 24-inch tile would not take care of the drainage, did they conceive the idea that Mud Creek should be left open as an overflow channel. But however this may be, it is not their contention that Mud Creek should be left open according to the old specifications made in 1897, but that it is to be left open as it was at the time that the drainage commissioners made the report. But nowhere in the report of the drainage commissioners is there any specification as to the width

or the depth, or the slope of the banks of Mud Creek as it now is. So that whatever the theory of the petitioners was on the trial of this cause, it seems to us, under the statute, of little consequence; because it cannot be conceded that the law would permit the condition of Mud Creek, as an open channel, to be left in the waste basket of memory and not require it to be made definite and certain as to its width and depth and slope. Those who were required to keep it in the condition that it was at the time of the commissioners' report should have something to which they might refer to find out what the specifications were.

Appellants' contention about the bulkhead being concave and conforming to the bottom of Mud Creek, and the other two contentions that we have set out about the grubbing of the shrubs and removing of the trees to a distance of twenty-five feet, and the covering of the tile up to the bottom of Mud Creek, are not sufficient to authorize the interpretation of this report that Mud Creek was to remain an open ditch. If the commissioners intended any such thing, they intended something that could not be done under the law, and something that would be utterly impossible because there would be no record anywhere to disclose the then dimensions of Mud Creek. The concave bulkhead was evidently designed to take care of flood waters during the time of the construction of this tile drain. Tile ditch construction begins at the lower end thereof. If this bulkhead were not concave, it would operate as a dam to Mud Creek, and would seriously interfere with digging the ditch and putting in the tile, in case of heavy rains.

So far as the other claim of appellants is concerned, about grubbing out the trees and taking out the shrubs, the commissioners simply took this from the statute it-

self, which requires that in the construction of a tile drain all shrubs and trees shall be removed on each side of the drain to a distance of 25 feet. §6142 Burns 1914, Acts 1907 p. 508, §3. The purpose of this, of course, is to keep the roots from filling up the tile and blocking and destroying the drainage. This provision of the report, instead of indicating that Mud Creek was to be left open, rather indicated that it was to be plowed full and farmed over by the adjoining landowners, when the tile was once in. Appellants also say in this connection that, because the specifications require the contractor to cover the tile even with the bottom of Mud Creek, therefore Mud Creek was to be left open. This presents the rather anomalous situation of putting in a 24-inch tile, say at a point where the tile is four feet below the bottom of Mud Creek, and still have two feet of earth left in the bottom of Mud Creek after the tile was covered up to the level of the bottom. Thus this very construction would throw two feet of earth into the bottom of Mud Creek and leave it there. All the lateral branches of this main drain that were provided for in the commissioners' report required the covering of the tile to the depth of two feet only, leaving it to the adjoining landowners to fill in the rest of the dirt. It would seem as consistent for appellants to contend that these lateral branches should be left open, except the two feet filled in by the contractor, as it is for them to contend that Mud Creek should be left open because of the provision that the tiles should be covered only to the level of the bottom of Mud Creek.

Because the court found on the evidence that the proposed work as decided upon and reported by the commissioners was not sufficient to properly

2. drain the land to be affected, the petition was dismissed. Twenty-three days after the judgment

dismissing the petition, appellants asked that the

3. commissioners be permitted to amend their report to provide that Mud Creek should remain open. If this provision had been in the original report, appellees would have had the right to contest the provision under the eighth statutory ground of remonstrance that the expense exceeded the aggregate benefits. §6143 Burns 1914, *supra*. This proposed amendment to the report, even if it had been timely, is subject to the infirmity that no specifications are offered as to the width, depth, slope or condition of the Mud Creek channel. The proposed amendment came too late and was too indefinite, had it been timely.

Appellants also complain that the court permitted four witnesses, put upon the stand by remonstrators, to testify as experts on the subject of whether the

4. 24-inch tile would drain the land. Appellants' contention about these witnesses goes rather to the weight of their evidence than to its admissibility.
5. It is claimed by the appellants that they did not show sufficient familiarity with the drainage in question to testify as experts. If they had any knowledge of the subject about which they were talking, it was proper for the trial court to hear them. It may be that the testimony offered had little weight, but this did not preclude its being admitted. They also complain because the court excluded the testimony of one of the drainage commissioners which they offered in rebuttal. It appears that this commissioner was not familiar enough with his own report to know the sizes of the tile provided for therein. It was not error to exclude his evidence. The report itself was in evidence, signed and sworn to by him, and in that he had given his opinion as to the efficiency of the proposed drainage. The trial court was correct in his construction of the commissioner's report, and the finding of the court is

not contrary to law, and is sustained by sufficient evidence.

The judgment is therefore affirmed.

NOTE.—Reported in 123 N. E. 115.

### INDIANA PIPE LINE COMPANY v. CHRISTENSEN.

[No. 23,242. Filed June 27, 1919.]

1. JUDGMENT.—*Nuisance. — Damages. — Continuing Abatable Nuisance.*—For a continuing abatable nuisance, damages may be recovered only to the date of the action, as there is a presumption that the cause producing the damage will be removed by an abatement of such nuisance; but if the nuisance is not abated, successive actions may be maintained so long as it is permitted to continue, in any one of which damages may be recovered for injuries occasioned prior to the commencement of the action and within the statute of limitations, not extending back of a former recovery. p. 403.
2. NUISANCE.—*Damages.—Continuing Nuisance.*—In an action for injury to products of the soil caused by a continuing abatable nuisance, the measure of damages is the depreciation in the rental value of the real estate affected. p. 403.
3. ACTION.—*Permanent Injury.*—Where a single completed act causes an injury to real estate, the effects of which will continue indefinitely, the damages occasioned thereby must be entirely compensated in a single action, since there is no continuing wrong upon which to base successive actions. p. 404.
4. DAMAGES.—*Measure.—Permanent Injury.*—Where a portion of land is permanently appropriated by wrongful act, or where it is so occupied as to deprive the owner of the use or occupation thereof, the general rule as to the measure of damages is the depreciation in the market value of the land occasioned by the appropriation or trespass. p. 404.
5. TRESPASS.—*Quare Clausum Fregit.—Nature of Action.*—The foundation of the action *quare clausum fregit* is the breaking by the defendant of the plaintiff's close, and the action can be maintained by one in possession having an interest in the profits only. p. 407.
6. TRESPASS.—*Quare Clausum Fregit.—Action.—Right to Maintain.*—In an action of trespass *quare clausum fregit* it is necessary for the plaintiff to prove only that he was in possession of the land and that the defendant entered thereon without

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Indiana Pipe Line Co. v. Christensen—188 Ind. 400.

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right, such proof entitling the plaintiff to nominal damages, without proof of injury; and upon additional proof of injury to products of the soil, the plaintiff is entitled to compensatory damages. p. 407.

7. ACTION ON THE CASE.—*Pollution of Stream.—Injury to Riparian Owner's Land.*—Under the common-law forms of pleading, trespass on the case is the proper form of remedy for injuries occasioned by oil carried by the waters of a creek from a defective pipe line and deposited on land, since the injury is not the direct result of force, but the indirect result of a wrongful act. p. 408.
8. ACTION.—*Forms.—Common Law.*—Though the common law forms of actions are abolished in this state, the rules of common law are not abrogated, and they obtain in civil actions under the Code whenever applicable to the facts pleaded and proved. p. 408.
9. TRESPASS.—*Trespass on the Case.—Action.—Defense.*—A wrongdoer who by a single completed act causes permanent injury to land can be compelled to pay only a single compensation therefor, and such wrongdoer, when sued for the injury to the freehold by one in possession, may set up as a defense that there is a valid outstanding title in another. p. 409.
10. TRESPASS.—*Trespass on the Case.—Action.—Defense.*—In an action against a wrongdoer for injury to land, where the title to the land is in issue only as indirectly affecting the measure of damages, proof that the plaintiff was in actual possession of the land under a claim of ownership is sufficient to make a *prima facie* case of title; and in the absence of counter-vailing proof, the *prima facie* showing of title will stand. p. 410.
11. ACTION.—*Damages.—Trespass on the Case.—Defense.—Successive Actions.*—In an action for injuries to the plaintiff's land caused by crude oil that was carried from the defendant's defective pipe line by the waters of a creek and deposited on a portion of such land, where it is not the plaintiff's theory that such portion has been wrongfully appropriated for the purpose of flowing oil thereon throughout the future, and the evidence shows the plaintiff to be in possession of all the land in the condition in which it was left after the water receded and fails to show a continuous or intermittent flow of oil causing injury so long as such pipe line is operated, the entire damage must be recovered in a single action and the recovery limited to damage resulting from the oil permitted to flow upon the land prior to the commencement of the action. p. 411.
12. DAMAGES.—*Permanent Injury.—Evidence.*—In an action by



a plaintiff for injuries to his land caused by crude oil that was carried from the defendant's defective pipe line by the waters of a creek and deposited on a part of the land, where the evidence showed only injury to products of the soil and that some of the plaintiff's stock was killed or injured by eating grass or drinking water contaminated with oil, but failed to show that the fertility or productive value of the soil was destroyed thereby, a verdict of \$17,000 must be deemed excessive. p. 412.

13. APPEAL.—*Review.*—*Verdict.*—Where it appears from the record that a verdict is based on improper items of damages, the verdict will be held to be excessive, and a new trial will be granted; and the same rule applies where a verdict is based on an item of damage that has no evidence to sustain it. p. 414.

From Laporte Circuit Court; *James F. Gallaher*, Judge.

Action by Christian Christensen against the Indiana Pipe Line Company. From a judgment for the plaintiff, the defendant appeals. *Reversed.*

*H. D. Bushnell, Holman, Bernetha & Bryant, Simmons & Daily and Myers, Gates & Ralston*, for appellant.

*George Burson, Darrow & Rawley and F. M. Trissal*, for appellee.

LAIRY, C. J.—This was an action to recover damages for the loss of cattle and the permanent injury to the 700-acre farm of appellee, Christian Christensen, occasioned by the escape of oil from the pipe line of appellant, Indiana Pipe Line Company. Appellee's complaint alleges among other things that he is the owner of 700 acres of land in Stark county, Indiana, which he has used for the past twenty years for the combined purposes of general farming and stock raising, and which is located on both sides of Pine Creek below the point where Pine Creek is crossed by appellant's pipe lines, which are used for the purpose of transporting crude petroleum oil across the State of Indiana. It is alleged that appellant negligently, carelessly and knowingly failed to make any proper inspection of its pipe

lines, and knowingly allowed the pipe lines to become disjointed, rotten, decayed, eaten with corrosion, and leaky, so that at divers times during the years 1914, 1915 and 1916, great quantities of crude petroleum oil escaped from appellant's pipe lines and flowed over and upon 500 acres of appellee's land, permeating, saturating and poisoning the soil. The complaint states that, by reason of the escape of such oil, the grasses and other vegetation of appellee's lands were destroyed, and the cattle of appellee became sick and died from the effect of the oil on the grass, and in the water which they drank. It is also alleged that the use of the entire 700-acre tract was impaired by reason of the destruction of the productive qualities of the 500 acres. A trial by jury resulted in a verdict and judgment in favor of appellee for the sum of \$17,000.

The controlling question presented by the several assignments of error relates to the measure of damages applicable to a case of the kind here presented.

1. Appellant asserts that the evidence shows only an injury to the products of the soil by a continuing abatable nuisance, and insists on the rule
2. of damages applicable in such cases. In cases of this character damages can be recovered only to the date of the action, as there is a presumption that the cause which produces the damage will be removed by an abatement of the nuisance. If the nuisance is not abated, its continuance, resulting in a damage, is a new and separate injury which gives rise to a new cause of action. Successive actions may be maintained so long as the nuisance is permitted to continue, in which damages may be recovered for all injury occasioned prior to the commencement of the action and within the statute of limitations, not extending back of a former recovery. The measure of damages in such a case is the depreciation in the rental value of the real estate af-

fect. *Cleveland, etc., R. Co. v. King* (1899), 23 Ind. App. 573, 55 N. E. 875; *Vandalia R. Co. v. Yeager* (1915), 60 Ind. App. 118, 130, 110 N. E. 230.

The rule stated applies to a tort of a continuous nature. By that is meant a wrongful act which produces a state of affairs, the continuance of which con-

stitutes a new wrong each moment; but it does not apply to a single completed wrongful act resulting in an injury, the effects of which will continue indefinitely. The damages occasioned by such an injury must be entirely compensated in a single award as there is no continuing wrong on which to base successive actions. The award covers all resulting damages both past and prospective. *City of Lafayette v. Nagle* (1887), 113 Ind. 425, 15 N. E. 1; *Porter v. Midland R. Co.* (1890), 125 Ind. 476, 25 N. E. 556.

Where a portion of the land is permanently appropriated, or where it is so occupied as to deprive the owner permanently of the occupation or use of a

portion of his land, the general rule as to the measure of damages is the depreciation in the market value of the land occasioned by the appropriation or trespass. In the case of *Indiana, etc., R. Co. v. Eberle* (1887), 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225. Judge Mitchell, speaking for the court said: "Whether the plaintiff may recover for the permanent depreciation in the value of his property, depends upon the permanent character of the injury, and the frame of the action. Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire as a result of the suit, the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the property injured, as in *Henderson*

v. *New York, etc., R.R. Co.*, 78 N. Y. 423; *Lohr v. Metropolitan Ele. R.R. Co.*, 10 N. E. Rep. 528; *Wichitaw, etc., R.R. Co. v. Fechheimer*, 12 Pac. Rep. 362; *Wood Nuisances*, section 856; *City of North Vernon v. Voegler*, 103 Ind. 314."

In the case at bar the court adopted the measure of damages applicable to the assessment of damages for lands appropriated. Evidence was admitted as to the market value of the entire 700-acre tract of land immediately before it was overflowed by the oil which escaped from defendant's pipe lines and the value of the same land after such overflow; and, under the instructions, the jury was permitted to base its award of damages on evidence of this character. Appellant asserts that the trial court erred in applying this rule for the assessment of damages to the facts as disclosed by the evidence in this case.

There is evidence to show that in the years 1914, 1915 and 1916 quantities of oil escaped from the pipe lines owned and operated by appellant company and was carried on the surface of the water down the ditches constructed through lands owned by appellee; and that, by reason of the water overflowing the lands of appellee, the oil was carried on and over parts of said land, where it remained on the grass and vegetation and in the soil after the water receded or evaporated. A part of the land having an area of about 500 acres was prairie land, and the remainder consisted of higher land on which the buildings were situated. There is no evidence that the high land was affected by the oil, but there is evidence to show that oil was found in considerable quantities on portions of the low land, and that it permeated the soil and was found on the grass and vegetation growing thereon. The evidence shows that the low land prior to the overflow produced native perennial grasses which were valuable for pasturage and

for hay, and that, in the years following the floods and before the trial, which began on September 28, 1916, portions of the land on which this grass had previously grown failed to produce the grass, being covered by weeds instead. As disclosed by the evidence, the land had been previously used for a stock farm, the low lands being utilized as meadow and as pasture for the cattle, and the buildings constructed on the higher land being of a size and character suitable for the storage of feed and the shelter of stock.

There can be no doubt that it was the theory of the plaintiff below that the injury to the real estate was of a permanent character, affecting the value of the farm as a whole, and that the trial court adopted that theory on the trial.

Appellant takes the position that, under the law and the evidence, appellee was not entitled to recover permanent damages to the farm as a whole, measured by the diminution in the market value of the fee-simple interest therein, for the reason that the evidence fails to show any title in appellee as to that portion of the farm lying north of the meander line established by the government survey and containing about 192 acres. It is asserted that appellee was required under the law to prove title to the land affected, and that the evidence shows that the title to the part of the farm on which the buildings are located north of the meander line in section 36 rests in the State of Indiana or in the government of the United States. This position of appellant is met by appellee with the proposition that a person who is in possession of land claiming to be the owner may maintain an action against a wrongdoer for permanent injury to the land without disclosing anything further than his possession and claim of ownership; and that such wrongdoer cannot set up an outstanding title in a third party for the purpose of defeating a recovery.

As sustaining this proposition, appellee cites several authorities which he claims to be in point. *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236; *Ohio, etc., R. Co. v. Trapp* (1891), 4 Ind. App. 69, 30 N. E. 812; *Cleveland, etc., R. Co. v. Born* (1911), 49 Ind. App. 62, 96 N. E. 777; *Barber v. Barber* (1863), 21 Ind. 468; *Winship v. Clendenning* (1865), 24 Ind. 439.

Appellant cites a number of cases to sustain the proposition that it is necessary for the plaintiff to prove title to the land in cases where he seeks to recover damages for permanent injury to the freehold. *Thompson v. Norton* (1860), 14 Ind. 187; *Broker v. Scobey* (1877), 56 Ind. 588; *Start v. Clegg* (1882), 83 Ind. 78; *City of Lafayette v. Wortman* (1886), 107 Ind. 404, 8 N. E. 277; *Burrow v. Terre Haute, etc., R. Co.* (1886), 107 Ind. 432, 8 N. E. 167; *Porter v. Midland R. Co., supra*.

The cases cited have been of no material assistance to the court. The foundation of the action *quare clausum fregit* is the breaking by defendant of plaintiff's

5. close. Its purpose is to recover damages for an invasion of the plaintiff's right of possession, and it can be maintained by a person in possession having no interest in the soil but an interest in the profits only. *Darling v. Kelly* (1873), 113 Mass. 29.

In such an action it is only necessary for plaintiff to prove that he was in possession of the land, and that the defendant entered thereon without right.

6. Such proof entitles the plaintiff to recover nominal damages. The cases cited by appellee hold that in such cases plaintiff need not prove title, proof of possession being sufficient, and that a defendant cannot prove title in another to defeat the action. It is well settled that one rightfully in possession may maintain an action against one who wrongfully invades his possession, even though it be the owner of the fee-simple interest in the land. He may recover nominal damages,

without proof of injury, and on proof of injury to the products of the soil he may recover actual possessory damages. An examination of the cases cited by appellee will show only such damages were proved and allowed as affected the plaintiff's possessory rights.

The cases cited by appellant do not sustain the position to which they are directed. They do not hold that it is necessary for plaintiff, in an action *quare clausum*, to prove a fee-simple title to the land. They hold that it is only necessary to prove possession either actual or constructive. If actual possession cannot be shown, constructive possession must be proved. In these cases actual possession was not shown and proof of constructive possession follows the title. It was held to be necessary to show a chain of transfers extending back to the government or to a person in possession at the time of his transfer, not for the purpose of proving title, but for the purpose of proving possession.

Under the common-law forms of pleading, an injury such as is here described could not have been redressed

in an action *quare clausum*, because the damages

7. were not the direct result of force, but resulted indirectly from the wrongful act of the defendant. The proper form of action would have been

8. trespass on the case; but the rule of law which required only proof of possession, where the damages sought were based on injuries affecting the possessory rights of plaintiff, would of necessity be applicable in the latter form of action. The common-law forms of action are abolished in this state, but the rules of common law are not abrogated. These rules obtain in civil actions under our Code whenever applicable to the facts pleaded and proved.

Appellant in this case proceeds on the theory that he is the owner in possession of the 700 acres of land described in his complaint, and he seeks to recover dam-

ages for injury to his personal property, to the products of the soil, and also for injury of a permanent nature to his interest and estate in the land itself. If he had pleaded and proved damages only to his possessory rights, there could be no doubt that proof of possession would be sufficient to entitle him to recover damages of that nature; but the damage recovered, as shown by the evidence, the instructions and the verdict, was the diminution of the market value of the fee-simple interest in the whole tract of land described.

The court is required to determine whether damages of this kind can be recovered by plaintiff on proof of mere possession, or whether it is necessary for

9. him to prove his interest in the land in order to entitle him to recover damages of a permanent nature. It may be that proof of possession being *prima facie* evidence of ownership would be sufficient to make a *prima facie* case in favor of plaintiff. Can the defendant rebut the *prima facie* case so made by evidence showing the true state of the title and thus disclose title in a third person? It is said that the defendant, having no interest in such a title, cannot be permitted to set up or assert it against the plaintiff. The purpose of such evidence is not to establish or enforce an outstanding title against plaintiff in such a way as to affect his title or interest in the land as between him and the owner of such outstanding title. The purpose of such evidence is to rebut the *prima facie* case of ownership made by plaintiff and to show that the damages which he seeks to recover for permanent injury to the freehold did not accrue to him on account of his interest in the land, but that such damages accrued in favor of another on account of his interest therein. It is true that the defendant can have no interest in having an outstanding title enforced against the plaintiff, but when he is called on to make compensation for an injury



of such a nature as to affect and reduce the value of the fee-simple estate in the land, he has an interest in having the court determine whether plaintiff, by reason of his interest in the land, is entitled to recover for the injury claimed. If this question cannot be presented by a defendant, he may be required to make compensation for an injury which materially diminishes the market value of the fee-simple estate in land at the suit of a person having only a possessory interest therein, after which he could be compelled at the suit of the owner of the fee to make a second compensation for the same injury. The law will enforce only a single compensation even as against a wrongdoer. The reasons stated would seem to compel the conclusion reached by the court; but, aside from the reasons upon which the conclusion rests, it is fully sustained by authorities bearing directly on the subject. 1 Sedgwick, Damages (9th ed.) §70; *Kelly v. New York, etc., R. Co.* (1880), 81 N. Y. 233; *Wallace v. Goodall* (1846), 18 N. H. 439; *Thomas v. Ohio Coal Co.* (1916), 199 Ill. App. 50; *McLeod v. Spencer* (1908), 21 Okla. 165, 95 Pac. 754, 17 L. R. A. (N. S.) 958, 129 Am. St. 774.

The court has reached the conclusion that, in cases where a plaintiff seeks to recover damages for an injury which permanently affects the land by reducing its market value, it is incumbent on him to prove such an interest in the land as entitles him to receive damages of that nature. It was therefore incumbent on appellee to prove title to the entire farm.

Appellant proved that he was in possession of the entire farm of 700 acres, and that he claimed to own it. Proof of actual possession under a claim of

10. ownership is sufficient to make a *prima facie* case of title, where the title to real estate is not directly in issue, but arises only indirectly as an incident to the right of the plaintiff to recover damages against

a trespasser. *Hungerford v. Redford*, (1872), 29 Wis. 345; *Rotch's Wharf Co. v. Judd* (1871), 108 Mass. 224; *Advance Elevator, etc., Co. v. Eddy* (1887), 23 Ill. App. 352. In this case appellant is sued as a wrongdoer, and the title is in issue only indirectly as affecting the measure of damages. In the absence of countervailing proof, the *prima facie* title shown by appellee will stand. The attention of the court has not been called to any evidence to meet the *prima facie* case made by appellee. Appellant attempts to question the title of appellee to a part of the land lying in the fractional northeast quarter of section 36, township 33 north, range 4 west, but no attempt is made to defeat the title of appellee by showing the true state of the record title. The evidence must be held sufficient to sustain appellee's title to the entire farm.

Appellant asserts that there is no evidence to show any permanent injury to the land, and that a verdict based on such theory is not sustained by the evidence.

Appellee does not claim that any part of his land has been appropriated or permanently occupied by appellant so as to deprive him of its use or occupancy.

11. Appellee still has the possession and use of all the land described in his complaint in the condition in which it was left after the water receded, leaving the deposit of oil on its surface. The evidence does not show a condition created by appellant causing a continuous or intermittent flow of oil, which will exist throughout the future, killing the vegetation and rendering the land unproductive so long as the pipe lines are maintained and operated. Appellee does not seek to recover damages on the theory that appellant has wrongfully appropriated to its use a portion of his land for the purpose of flowing oil thereon throughout the future. On such a theory he would be entitled to be awarded damages for a permanent injury to the land, and, by the

payment of the amount awarded, appellant would acquire a right against appellee to use the land so appropriated for that purpose. The wrongful act on which the action is based is not treated as a continuing nuisance, but a completed tortuous act, resulting in permanent injury to the land affected. Under the pleadings and the evidence in this case, the recovery must be limited to damages resulting to the land from the oil which had been permitted to flow thereon prior to the commencement of the action; but the entire damage resulting therefrom must be recovered in one action. *Porter v. Midland R. Co.*, *supra*; *West Leigh Colliery Co. v. Tunnickliffe* (1908), 10 Ann. Cas. 74.

It is the theory of appellee, as disclosed by the record, that the effect of the oil which appellant had permitted to flow upon the land had killed the grass and

12. vegetation growing thereon and had so affected said land as to permanently destroy its fertility and productive value. Under such a theory the wrongful act has been completed and all of the damage to flow therefrom has been consummated. The abatement of the condition which might occasion further damage could neither enhance nor diminish the amount of recovery, as, under the theory adopted, damages can be recovered only for the injury already inflicted. It can be readily seen that a recovery for the amount of depreciation in the rental value of the land to the time of the commencement of the action would not compensate appellee for the loss sustained, if it is true that the fertility and productive value of the land were permanently destroyed. Appellant asserts, however, that there is no evidence in the record from which the jury could find that the fertility or productive value of the soil was destroyed. In the opinion of the court, appellant is correct in this statement. The evidence in the case is so voluminous that it is impracticable, within

the scope of this opinion, to review it at length. It is shown that great quantities of oil found its way upon the land and was left there after the water receded. Evidence was introduced showing that samples of soil furnished by appellee were analyzed and that as much as 7½ ounces of crude oil to the cubic foot were found, while in other samples taken from the land no oil was found. There is evidence to show that crude oil has a harmful effect on certain things and that it will kill vegetation, but none to show that it would affect the fertility or the productive value of the soil itself. It is shown that, after the flood, portions of the land did not produce the native grass that had grown there prior to that time, and that the surface in places was bare of vegetation, while in other places the ground was covered with weeds. This might justify the inference that the oil killed the grass and destroyed the sod and roots, especially if the failure of the grass to grow was confined to the places most affected by the oil, but it would not justify an inference that the soil had lost its fertility or productive value. There is also evidence by Mr. Helmer and Mr. Kottka as to oil on the Bunge farm on which these gentlemen had resided. This evidence shows that a flow of oil on portions of those lands had destroyed the native grasses and parts of a timothy meadow. This evidence shows that there is a place in the pasture where the grass had been killed out by oil about eleven years before the trial, and that practically nothing had grown on that place since, but it does not show that there had been any attempt to reseed it to grass or to cultivate it in any other kind of crop.

Appellee testified that he plowed up a part of one forty-acre tract that had been overflowed by oil, and that, in 1916, he sowed a part in oats, a part in millet, a part he planted in corn. He testified that he got one wagon load of bundles of oats out of a field of twenty

acres, that there was no corn crop at all, and that fifteen acres of millet produced only one wagon load. He stated that the land had produced before that, and gave some figures as to the crops in the years 1914 and 1915; but there was no evidence to show whether the failure of the crops in the year 1916 on the particular fields to which he referred was due to a condition of the soil produced by the flow of oil, or whether it was due to some other cause. The attention of the court has not been called to any other evidence showing an effort to produce crops on any of the land affected. There is no evidence to show that it would not produce grass, if properly seeded, or that it would not, under favorable conditions, produce other crops. The evidence most favorable to appellee is not sufficient to warrant a finding that the productive quality of the soil was destroyed or permanently injured from the effects of the oil.

As heretofore stated there is evidence to show an injury to the products of the soil, and also to show that appellee's stock pasturing on his lands was injured, and that some of it was killed as a result of oil swallowed in eating grass and drinking water on the land. Under the evidence, appellee was entitled to a verdict for these items of evidence.

When the amount of the verdict is considered in connection with the evidence in relation to the items of damages for which appellee is entitled to recover,

13. it seems apparent that the jury must have awarded damages on account of permanent injury to the productive qualities of the soil. In testifying to the market value of the land before the oil flowed over it, and of the same land immediately afterward, the witnesses must have based their testimony on the assumption that the fertility of the soil was destroyed, and that the land would remain in that condition for an indefinite period; and the jury must have

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Jackson, Rec., v. Rutledge—188 Ind. 415.

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based the damages as awarded by its verdict on the depreciation in the market value of the land as shown by such evidence. Where it appears from a record that a verdict is based on improper items of damages, the verdict will be held to be excessive, and a new trial will be awarded. *Cleveland, etc., R. Co. v. Hadley* (1907), 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1; *City of Indianapolis v. Stokes* (1914), 182 Ind. 31, 105 N. E. 477; *Board, etc. v. Fertich* (1897), 18 Ind. App. 1, 46 N. E. 699. The same rule must be applied where the verdict appears to be based on an item of damage which has no evidence to sustain it. For the reasons stated, appellant's motion for a new trial should have been sustained.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 123 N. E. 789. Damages caused by refineries, gas wells or leaks, 107 Am. St. 245. See under (1) 23 Cyc 1186, 29 Cyc 1254; (3) 1 C. J. 1119; (4) 17 C. J. 884, 38 Cyc 1126; (5) 38 Cyc 1072; (8) 1 C. J. 1004.

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### JACKSON, RECEIVER, v. RUTLEDGE.

[No. 23,228. Filed March 27, 1919. Rehearing denied June 27, 1919.]

1. **APPEAL.—Assignment of Error.—Sufficiency of Complaint.**—Where a complaint was not challenged by demurrer for insufficiency of facts, it may not be challenged on appeal on such ground by independent assignment of error, in view of §344 Burns 1914, Acts 1911 p. 415. p. 420.
2. **NEGLIGENCE.—Contributory Negligence.—Proof.—Rule Under Federal Employers' Liability Act.**—In an action under the federal Employers' Liability Act by a conductor of a train for personal injuries suffered in a collision, it is only after negligence on the part of the defendant is shown that it becomes material to determine the question of the plaintiff's contributory negligence, which under the act can only diminish the damages recoverable. p. 420.

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Jackson, Rec., v. Rutledge—188 Ind. 415.

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3. **MASTER AND SERVANT.—Injuries to Conductor.—Negligence.—Sufficiency of Evidence.—Verdict.**—In an action under the federal Employers' Liability Act for injuries sustained by the plaintiff conductor as a result of a collision, the evidence is reviewed and held sufficient to support a verdict for the plaintiff on the issue of the defendant's negligence, in view of the rule that the verdict, as against the objection that it is wholly unsupported by evidence, must stand on appeal unless the court finds that the evidence most favorable to the plaintiff appellee is such that no reasonable inference of the negligence charged can be drawn therefrom. p. 421.
4. **APPEAL.—Weight of Evidence.—Review.**—In an action under the federal Employers' Liability Act, the contention that, since the injured plaintiff had the burden of proof on the issue whether the train on which he was employed was being operated in interstate commerce, he cannot recover where the evidence on each issue was evenly balanced, is of no avail on appeal, since the Supreme Court will not weigh the evidence. p. 423.
5. **APPEAL.—Excluding Contradictory Statement.—Effect.**—Where, on cross-examination, a witness for the plaintiff identified a written statement as one signed by him previously to the trial, and did not deny a statement therein that was contradictory to his testimony, but in effect admitted it, the exclusion of such written statement was not harmful to the defendant. p. 423.
6. **TRIAL.—Defective Pleading.—Cure by Evidence.—Instructions.**—Where, in a railway conductor's action for injuries under the federal Employers' Liability Act, the complaint stated only inferentially the essential fact that the plaintiff and the train upon which he worked were engaged in interstate commerce at the time of the injury, the court properly instructed that the plaintiff establish such fact, since under the statute a defective complaint may be cured by the evidence and will be deemed amended to conform to the evidence. p. 424.
7. **MASTER AND SERVANT.—Negligence of Servant.—Master's Liability.—Instructions.**—In a railway conductor's action for injuries under the federal Employers' Liability Act, where all the negligence charged related to the conduct of the engineer and the conductor of a train that collided with the train upon which the plaintiff was conductor, an instruction that, if the first named employes committed any of the acts of negligence charged which proximately caused the plaintiff's injury, the defendant would be liable, was not objectionable as imposing a liability on the defendant for negligent acts of such employes outside the scope of their employment. p. 425.

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Jackson, Rec., v. Rutledge—188 Ind. 415.

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8. **TRIAL.**—*Questions of Law or Fact.*—In a railway conductor's action for injuries under the federal Employers' Liability Act, an instruction permitting the jury to determine as a question of fact whether certain rules of the railroad company were in effect was error, such question being one of law. p. 426.
9. **APPEAL.**—*Invited Error.*—An appellant who tendered instructions containing the same error as a given instruction of which he complains is in no position to avail himself of the error. p. 426.
10. **APPEAL.**—*Erroneous Instruction.*—*Harmless Error.*—In a railway conductor's action for injuries, under the federal Employers' Liability Act, an instruction, though it improperly permitted the jury to decide as a fact whether the failure of certain employees to observe precautions prescribed by a rule of the company was negligence, was not prejudicial to the defendant where such instruction, in view of the evidence, was not more unfavorable than one would have been that stated the law correctly. p. 426.
11. **DAMAGES.**—*Loss of Leg.*—Where the plaintiff, who was thirty-six years of age, suffered injuries causing great pain, disqualifying him for the work in which he was engaged and necessitating an amputation of the leg below the knee and a second amputation above the knee when gangrene ensued, a verdict of \$20,000 in an action for the injury was not excessive, there being no evidence showing his earning capacity in other employments. p. 428.
12. **DAMAGES.**—*Discretion as to Amount.*—The amount of damages to be awarded for pain and suffering rests largely in the discretion of the jury, there being no exact standard for determining the question. p. 428.
13. **APPEAL.**—*Reduction of Verdict.*—In an action for injuries, under the federal Employers' Liability Act, the court on appeal is without power to say that the verdict should have been reduced on account of contributory negligence, unless it can say that the plaintiff was guilty of contributory negligence as a matter of law. p. 429.
14. **APPEAL.**—*Verdict.*—*Presumption.*—Where, in a personal injury action under the federal Employers' Liability Act, contributory negligence under the evidence was a question of fact for the jury, the court on appeal cannot assume that the jury found the plaintiff guilty of contributory negligence, in order to reduce the amount of the recovery, but, on the contrary, will indulge every presumption in favor of the verdict. p. 429.
15. **MASTER AND SERVANT.**—*Injury to Servant.*—*Contributory Negligence.*—*Evidence.*—In an action under the federal Em-



ployers' Liability Act by a conductor for injuries sustained in a rear-end collision between freight trains, the Supreme Court cannot say as a matter of law that the plaintiff was guilty of contributory negligence for failing to require the rear brakeman to observe a certain rule relative to the guarding of the rear of the train, which rule applied only when the train was stopped, in view of evidence from which the jury could find that the train was kept moving. p. 429.

16. **MASTER AND SERVANT.—Contributory Negligence.—Ordinary Care.—Jury Question.**—In an action under the federal Employers' Liability Act by the plaintiff conductor for injuries sustained in a rear-end collision between freight trains, whether the conductor was guilty of contributory negligence in failing to observe rules relative to the dropping of fusees for the purpose of warning an approaching train was a question for the jury, where such rules were not specific, but permitted the trainmen, in the observance thereof, to exercise the care that men of ordinary prudence would use under the particular circumstances. p. 430.

17. **MASTER AND SERVANT.—Contributory Negligence.—Evidence.**—In an action under the federal Employers' Liability Act for injuries sustained by the plaintiff conductor in a rear-end collision between freight trains, the failure of the plaintiff to have a light burning in the cupola of the caboose did not constitute contributory negligence as a matter of law, under evidence showing that the light would not burn, that the plaintiff was using the caboose for the first time and had no previous knowledge of the defective condition of the light. p. 431.

18. **DAMAGES.—Future Suffering.—Recovery.—Instructions.**—In an action for injuries, an instruction, although subject to criticism in that it told the jury that it might consider future pain and suffering, if any "likely" to occur, was not so misleading as to be reversible error; the more accurate rule is to limit such recovery to such pain as the injured party is reasonably sure to suffer. p. 431.

From the Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by Sylvanius E. Rutledge against William J. Jackson, receiver. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

*John E. Iglehart, Edwin Taylor, Eugene H. Iglehart and Embree & Embree*, for appellant.

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Jackson, Rec., v. Rutledge—188 Ind. 415.

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*T. Morton McDonald, Robert W. Armstrong and Douglas Morris, for appellee.*

LAIRY, J.—Appellee recovered a judgment for \$20,000 for personal injuries sustained by him as a result of a rear-end collision between two freight trains operated on a railroad of which appellant was receiver. At the time of the collision appellee was in the employ of appellant acting as conductor of extra train 901 running north from Seiffert to Terre Haute, and when about three-fourths of a mile north of Youngs, the train, of which appellee was conductor, was run into from the rear by the locomotive of regular train 362 operated by servants of appellant. Train 901 left Seiffert under a caution block, there being a train ahead in the same block designated as extra 961. As train 901 approached Youngs a red fusee dropped by the train ahead caused it to slow down till the signal burned out, after which it continued north until the collision occurred at a point about three-fourths of a mile north of Youngs. At the time train 901 slowed down for the red fusee it did not come to a full stop, but proceeded at the rate of three or four miles per hour until the fusee burned out, after which it proceeded north and was running from eight to ten miles per hour when train 362 came into collision with it from the rear. Train 362, which collided with the rear end of train 901, left Seiffert under a caution block which indicated that the block was not clear of other trains and that the train must proceed with caution.

The complaint proceeds on the theory that the servants of appellant in charge of train 362 were negligent in operating said train, under the conditions shown, at a dangerous rate of speed and in failing to look out for and observe the signal lights displayed on the rear end of the caboose of train 901, which negligence is alleged

to have been the proximate cause of the collision and the resulting injury to appellee.

The case was tried on the theory that the right of action was based on the federal Employer's Liability Act.

The sufficiency of the complaint to state a cause

1. of action is not challenged. No demurrer addressed thereto was filed, and an attempt to challenge the sufficiency of a complaint by an independent assignment of error is now unavailing. §344 Burns 1914, Acts 1911 p. 415; *Gary, etc., R. Co. v. Gunn* (1915), 184 Ind. 306, 111 N. E. 183; *Hedekin Land, etc., Co. v. Campbell* (1916), 184 Ind. 643, 112 N. E. 97.

There is only one error well assigned, and that is that the trial court erred in overruling appellant's motion for a new trial.

The first question presented under the motion for a new trial is the sufficiency of the evidence to sustain the verdict. It is claimed by appellant that there

2. is a total want of evidence to show negligence on the part of the defendant below, and that the evidence shows without dispute that the collision was caused solely by the negligence of the plaintiff. Unless there is evidence to sustain negligence on the part of defendant, the verdict must necessarily fall regardless of any other consideration. In the absence of proof of negligence on the part of defendant, the presence or absence of contributory negligence on the part of plaintiff can have no bearing on the case. On the other hand, if negligence on the part of defendant is shown, it then becomes material to determine whether or not plaintiff was guilty of contributory negligence. At common law contributory negligence, when shown, had the effect of defeating a recovery, but under the statute on which this action is based it has no effect other than to diminish the damages recoverable. *Norfolk, etc., R. Co. v. Earnest* (1912), 229 U. S. 114, 33 Sup. Ct. 654, 57 L.

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Jackson, Rec., v. Rutledge—188 Ind. 415.

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Ed. 1096, Ann. Cas. 1914C 172; *Second Employers' Liability Cases* (1911), 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

In disposing of the question here presented, the court may eliminate all evidence on the subject of contributory negligence and consider only the evidence bearing on the question of defendant's negligence. As constituting negligence appellee relies on the evidence showing the manner in which train 362 was operated by the servants of the receiver in charge, and especially the evidence in reference to the speed of such train immediately before the collision, and the failure of the engineer to observe the red lights on the rear of the caboose and to have his train under such control as to enable him to stop it in time to avoid a collision.

As bearing on this question, the evidence shows that train 362 left Seiffert under a yellow block. The evidence of trainmen showed that such a signal in-

3. dicated the presence of a train ahead within the block and amounted to an instruction to run under control expecting to find a train ahead. There is a conflict in the evidence as to the speed at which train 362 was run from Seiffert to the place of the collision. The distance is about  $8\frac{3}{4}$  miles. The train left Seiffert at 7:06 as shown by all the evidence and the evidence most favorable to appellee shows that the collision occurred at 7:20, while there is other evidence that it occurred at 7:28. To cover the distance in fourteen minutes the train would be required to run at an average speed of  $37\frac{1}{2}$  miles an hour, and to cover the distance in twenty-two minutes it would be required to average 23.8 miles an hour. There is evidence to show that the steam was shut off and the brakes set when the train was 600 feet south of the caboose and that when the fireman of the locomotive jumped off at a point 300 feet from the place of collision the train was

moving at the speed of fifteen miles an hour. There is also evidence that the red side-lights were showing on each side of the caboose, and that the track for a distance of one-half to three-fourths of a mile south of where the collision occurred is straight and without obstructions to the view. The engineer of train 362 testified that he saw a red light ahead after leaving Youngs but that he mistook it for a signal light at Honey Creek, which the evidence shows to be about twenty feet above the track. There is also testimony of railroad men as to the speed of the train and the distance within which it could have stopped under the conditions shown. It is true that there is evidence to show that the engineer in charge of train 362 saw no fusee on the track or other signals to indicate that the train ahead had been delayed or that it was running at slow speed, and rules of the company are in evidence which require the rear brakeman to give such warnings when the train is delayed and which require the conductor to see that the brakeman obeys the rule. The absence of burning fusees or other signals, as well as the absence of the light in the cupola of the caboose, if shown, were circumstances to be considered by the jury in connection with the other facts, conditions and circumstances disclosed by the evidence in deciding whether the engineer in charge of train 362 exercised the care and prudence that a man of ordinary judgment and prudence would have used under the circumstances. The jury decided this question adversely to appellant, and this verdict must stand on appeal unless this court can say that the facts disclosed by the evidence most favorable to appellee are of such a character that no reasonable inference of the negligence charged can be drawn therefrom. It cannot be said as a matter of law that the verdict, on the issue of appellant's negligence, is wholly unsupported by the evidence.

It is also claimed that the evidence is insufficient to show that the train on which appellee was employed was being operated in interstate commerce and

4. that appellee was engaged in interstate commerce at the time the collision occurred; but, in the presentation of the matter, it is admitted that there is some evidence that there were cars in the train billed to Chicago, Illinois, and others to other points in that state. Appellant asserts that the evidence on the point is equally balanced and that appellee, having the burden of the issue, was not entitled to succeed under such a state of the evidence. Such an argument would be proper if presented to the jury whose province it is to weigh the evidence, or to the trial court when the sufficiency of the evidence is presented by a motion for a new trial; but it has no place on appeal where the court cannot consider the weight of the evidence.

H. F. Goad, who was the rear brakeman on train 901 on the night of the collision, was called by appellee as a witness, and stated as a part of his testi-

5. mony that the light in the cupola of the caboose on that train was burning when the train left Seiffert, and that he was not able to state positively whether it was burning or not at the time of the accident. On cross-examination the witness was shown a written statement which he identified as a statement signed by him previous to the trial. On being examined concerning the statement, he said that he did not remember saying as part of the statement that the cupola light was not burning; but, if he did make such statement, his memory was then fresher than at the time of testifying. He was then asked the following question: "I read you now, 'the markers were lighted at Shelburn on that date, but I don't remember who lighted them, neither do I remember talking to Mr. Rutledge about them; the cupola light was not burning as

it had not been working for several days.' I will ask you now, if that wasn't the fact." In answer the witness said, "To the best of my knowledge, I believe it is. It was in bad shape, I won't say positive." As a part of appellant's case in chief, the whole statement consisting of four pages was offered in evidence for the purpose of impeaching the witness Goad. The court sustained an objection interposed on behalf of appellee and the statement was excluded. This ruling does not constitute reversible error. The witness on cross-examination did not deny making the statement in question, but practically admitted it. The matter was so fully before the jury that the exclusion of the written statement could not have harmed appellant.

Several instructions given by the court and objected to by appellant as erroneous are presented on appeal.

By instruction No. 2 the court undertook to

6. state to the jury the material facts essential to a recovery as charged in the second paragraph of complaint. The only objection offered relates to a statement in the instruction to the effect that the receiver was engaged in interstate commerce in the operation of a certain freight train which was then and there used for the transportation of freight between the states of Indiana and Illinois, and that on said day plaintiff, as the servant of defendant, was engaged as such servant in the operation of said train as conductor. Appellant asserts that the complaint does not directly allege, as required by the federal law, that appellee and the train of which he was conductor were at the time of his injury engaged in interstate commerce, but that such fact is stated only inferentially and by way of conclusion. Under the statutes of this state and the decisions of our courts, a defective complaint may be cured by the evidence and will be deemed amended to conform to the evidence. §700 Burns 1914, §658 R. S. 1881; *Vulcan*

*Iron, etc., Co. v. Electro, etc., Min. Co.* (1913), 54 Ind. App. 28, 36, 99 N. E. 429, 100 N. E. 307; *Noble v. Davison* (1911), 177 Ind. 19, 24, 96 N. E. 325. The courts have gone to the extent of holding that a pleading which wholly fails to allege a material fact necessary to a recovery may be cured by evidence of the omitted fact introduced without objection, and that on appeal the complaint will be deemed amended to conform to the evidence. If such were not the rule, evidence of such omitted fact might be introduced both *pro* and *con* on the theory that such fact was material to the issue, the question might be fairly submitted to the jury under proper instructions, and a verdict returned in accordance with the evidence, and yet the losing party on appeal would be entitled to a reversal on account of the defect in the complaint. The statute and the decisions cited are intended to guard against such a result. It was highly proper for the court to inform the jury that such fact must be established by a preponderance of the evidence to justify a verdict for plaintiff. This court has recently held an instruction to be erroneous which authorized a verdict for plaintiff on proof of all the material facts alleged in the complaint, where a fact essential to a recovery was entirely omitted from the complaint, and where the instruction passed on did not require, as a prerequisite to recovery, that the fact omitted should also be proved by a preponderance of the evidence. *Prudential Ins. Co. v. Ritchey* (1918), *ante* 157, 119 N. E. 369, 484.

Parker was the conductor and Fitzsimmons was the engineer of train 362. There was no error in that part of instruction No. 5 by which the jury was told

7. that, if it found by a preponderance of the evidence that Parker or Fitzsimmons committed any of the acts of negligence charged in the complaint which operated as a proximate cause of appellee's injury, such



negligence would render the defendant liable. The negligence charged all related to the conduct of those employes in the management of the train and in the observance of signals. For their negligence in those respects the employer was liable under the statute. The instruction is not open to the objection that it imposes a liability on appellant for their negligent acts done outside the scope of their employment.

Objection is made to certain instructions given on the ground that they permitted the jury to determine as a matter of fact whether certain rules of the com-

8. pany introduced in evidence were in force and effect at the time of the collision. Under the evidence in this case no such question of fact

9. was presented. It was for the court to say as a matter of law what rules were in force and effect, but, as appellant invited this error by tendering instructions having the same effect and containing the same vice, he is in no position to avail himself of the error. *Marion Trust Co. v. Robinson* (1915), 184 Ind. 291, 292, 110 N. E. 65.

Instruction No. 12 relates to certain rules of the company introduced in evidence relating to the means to be employed in protecting the rear end of a

10. train when it is stopped or so delayed that there is danger that it may be overtaken. Rule 99 provides that the rear of the train shall be protected under certain conditions by the rear brakeman going back with stop signals a safe distance to secure full protection. He must at once place a torpedo on the rail and remain until recalled. The amendment provides that, as soon as a train stops, the rear brakeman must be on the ground ready to protect the rear end of the train, and where the train makes an unusual stop or is detained at a regular stop, he must go back at once and properly protect his train. It is apparent that this man-

ner of protecting the rear end of a train applies only when the train is stopped, as it would not be practical for the rear brakeman to go back and place torpedoes and remain until recalled when his train was constantly moving forward. In case the train is running slowly, another means of protecting the rear end is provided by dropping burning fusees to serve as warning signals to a train following. A red fusee in the track is a signal for the rear train to stop, and a yellow fusee is a signal to move slowly and with caution. These fusees burn about five minutes. As bearing on evidence of this character, the court instructed the jury, in substance, that if it found that more than one rule was in force respecting the manner of protecting the rear of the train by the rear brakeman, and if it found that the rear brakeman did the things required by one rule and omitted to do the things required by the other, it was for the jury to say as a question of fact whether, in omitting the precautions required by one rule and observing those provided by the other, such rear brakeman exercised ordinary care. The instruction is objected to on the ground that disobedience of an established rule is negligence as a matter of law, and should be so declared by the court, leaving it for the jury to say only whether the precautions prescribed by the rule were observed; and it is asserted that the instruction under consideration permits the jury to decide as a fact whether the failure to observe the precautions prescribed by a rule did, or did not, constitute negligence. The instruction cannot be approved; but under the evidence in this case it was not prejudicial to appellant. There is evidence to show that the train on which Goad was rear brakeman did not stop after it entered the block, and that it was at no time moving slower than three to four miles an hour. Under this state of the evidence, the jury might have been properly instructed

to the effect that, if it found that the train was at all times moving at such a rate of speed as made it impracticable to protect the rear by sending the rear brakeman back with stop signals and torpedoes as provided in rule 99, then the rule in so far as it prescribed those precautions had no application, and that a failure to observe such precautions would not constitute negligence. The instruction given was not more unfavorable to appellant than an instruction would have been which correctly stated the law. A judgment should not be reversed on account of error of this character.

The remaining question relates to the amount of damages awarded by the verdict. Appellant asserts that \$20,000 is excessive in view of the nature and

11. extent of appellee's injuries, and especially so in view of the fact, as claimed, that he was guilty of contributory negligence, which under the federal

12. statute is to be given effect by diminishing the damages to be awarded. At the time of his injury appellee was a man about thirty-six years of age, earning \$1,800 a year as a railroad conductor. The injury resulted in the loss of a leg, which was first amputated below the knee, after which gangrene ensued, necessitating a second amputation above the knee, which was performed thirty-three days after the injury. The evidence shows that he suffered great pain and that his vitality became so reduced from the effect of the gangrene and as a result of other injuries that the physicians in charge gave it as their opinion that he could not recover. The evidence further shows that, when appellee left the hospital after ten weeks, his hair was gray, and that before the accident his head was free from gray hairs. The loss of his limb disqualifies appellee for service as a trainman, and there is no evidence as to his earning capacity in other lines. The amount of damages to be awarded for pain and suffer-

ing cannot be measured by any exact standard, and for that reason it rests largely in the discretion of the jury. The attention of the court is called to a decision of the Supreme Court of the United States by which that court refused to disturb a judgment for \$5,000 for pain and suffering endured by the deceased from the time of his injury to the time of his death, the period of time being approximately thirty minutes. The court said: "The award does seem large, but the power, and with it the duty and responsibility of dealing with this matter rested upon the courts below. It involves only a question of fact and is not open to reconsideration here." *St. Louis, etc., R. Co. v. Craft* (1914), 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160. In view of the evidence in this case, the damages cannot be regarded so excessive as to require a reversal, unless the amount of damages awarded should have been reduced on account of contributory negligence on the part of appellee.

This court is without power to say that any deduction should have been made unless it can say that appellee was guilty of contributory negligence as a matter of law. If contributory negligence, under the evidence, was a question of fact for the jury, this court has no means of knowing from the record here what result the jury reached by such determination. Under such a state of the evidence, this court could not assume that the jury found appellee guilty of contributory negligence, but, on the contrary, every presumption would be indulged in favor of the verdict.

Under the evidence in this case, it cannot be said as a matter of law that appellee was guilty of contributory negligence. Appellant asserts that the evidence shows without dispute that the rear brakeman failed to comply with rule 99 and the amendment

thereto with reference to protecting the rear end  
16. of the train, and that under the rules it was the  
duty of appellee, as conductor, to see that the  
rear brakeman did obey this rule. Under the rule referred to, the failure of the conductor to require his rear brakeman to observe the rules with reference to guarding the rear of the train would be negligence on the part of the conductor. As we have seen, however, there was evidence from which the jury may have found that the train in charge of appellee was not stopped at any time after it entered the block, and that it was at all times running at such a rate of speed as to render it impracticable to guard the rear by sending the rear brakeman back with stop signals and torpedoes. If the jury so found, the provisions of the rule as to the specific precautions to be observed in case the train was stopped would have no application, and the failure to observe such precautions would not be negligence *per se*. The only other means provided for protecting the rear end of a train which is so delayed as to be in danger of being overtaken is by the use of fusees. A red fusee dropped on the track is a signal for a train following to stop, and a yellow fusee so dropped is a signal to proceed slowly and with caution expecting to find a train ahead. The attention of the court has not been called to any rule which prescribes specifically and definitely how these fusees shall be dropped as to time or distance. The rules do not provide that these fusees shall be dropped off at stated intervals of time or at stated distances apart on the track. Under such a state of the rules, no definite precautions were prescribed. It was left to the conductor and rear brakeman on the delayed train to exercise such judgment and care as a person of ordinary prudence would use in view of the speed of the delayed train and the dangers to be anticipated and the other

conditions and circumstances involved. The care required by the rules as to dropping fusees was the same as that exacted at common law, and is to be measured by the same standard. What is ordinary care under the facts and circumstances of a particular case is generally a question of fact for the jury. There was evidence to show that a yellow fusee was dropped about one mile back from the place where the collision occurred. Whether ordinary care required that a red fusee should have been dropped instead of a yellow one, or that other yellow fusees should have been dropped, presented a question of fact for the decision of the jury.

It is also claimed that appellee was negligent as a matter of law in failing to have a light in the cupola of his caboose. There is evidence to show that the  
17. cupola light was out of repair and would not burn, and that appellee was using the caboose for the first time on the day he was injured, and did not previously know of the defective condition of the light. In view of the law as stated and of the facts disclosed by the record, the court cannot declare as a matter of law that appellee was guilty of contributory negligence. The question of appellee's contributory negligence was one of fact for the jury, and, if the jury found from the evidence that he was free from negligence, and refused to abate his damages on that account, this court cannot disturb the verdict.

Objections are made to a number of instructions given by the court bearing on the measure of damages. Most of these objections are without merit. One in-  
18. struction, however, is subject to criticism, in that it told the jury that it had a right in fixing the amount of damages to consider future pain and suffering, if any *likely* to occur. While it is regarded as more accurate to limit recovery for future suffering to

such pain as the injured party is reasonably sure to suffer, the court is of the opinion that the language used did not mislead the jury.

Judgment affirmed.

NOTE.—Reported in 122 N. E. 579. Comparison of negligence under the federal Employers' Liability Act, Ann. Cas. 1914C 175. Personal injuries: right to recover for future pain and suffering, 9 Ann. Cas. 1051; what is excessive verdict for injuries not resulting in death, 16 Ann. Cas. 8, Ann. Cas. 1913A 1361. See under (3) 26 Cyc 1444; (7) 26 Cyc 1502; (11) 17 C. J. 1075.

### ROCHESTER BRIDGE COMPANY ET AL. v. MCNEILL.

[No. 23,227. Filed March 26, 1919. Rehearing denied June 27, 1919.]

1. **FRAUD.**—*Settlement for Personal Injuries.*—*Effect on Right of Action.*—Though an unrescinded contract for settlement of damages for personal injuries precludes a recovery for negligence causing the injury, it does not preclude an action for fraud whereby the settlement was brought about. p. 436.
2. **FRAUD.**—*Pleading.*—*Opinions.*—A statement, though based on the expression of an opinion, may amount to actionable fraud, if it is a mere contrivance of fraud, or if the person to whom it was expressed has justly relied on it and has been misled, or when it is coupled with other circumstances. p. 436.
3. **FRAUD.**—*Nominal Damages.*—Where one procures a contract by fraud, the defrauded party may recover at least nominal damages. p. 438.
4. **PLEADING.**—*Complaint.*—*Demurrer.*—Though a complaint states a cause of action for only nominal damages, the overruling of a demurrer thereto on the grounds of insufficiency will be sustained on appeal. p. 438.
5. **FRAUD.**—*Settlement of Claim.*—*Complaint.*—*Validity of Claim.*—A complaint for substantial damages caused the plaintiff by the defendant's fraud in procuring a contract of settlement for personal injuries, to warrant a recovery of such damages, must show not only the fraud but also a valid claim against the defendant for the original injury. p. 439.
6. **PLEADING.**—*Demurrer.*—*Admissions.*—A demurrer to a complaint admits not only the facts directly and specifically al-

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Rochester Bridge Co. v. McNeill—188 Ind. 432.

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leged but also all facts that can be implied by reasonable and fair intendment. p. 439.

7. FRAUD.—*Complaint.—Fraudulent Release Contract.—Elements of Cause.*—The essential elements of a cause of action for damages based on the fraudulent procurement of a settlement of a claim for personal injuries are representations, falsity, scienter, deception and injury. p. 439.
8. FRAUD.—*Liability for Representations.—“Actionable Fraud.”*—A party who makes an untrue representation as to a material fact, not knowing whether it is true or untrue, though he believes it to be true, with the intention that another shall act upon it, and such other does act thereon to his injury, is guilty of “actionable fraud.” p. 439.
9. FRAUD.—*Measure of Damages.—Settlement for Injury.—Instructions.*—The measure of damages for a fraudulent procurement of a settlement of a claim for personal injuries is the amount to which the plaintiff was entitled under all the circumstances on the day of the trial, less any amount received at such time; hence an instruction proceeding upon the theory of an award as of the date of the trial was erroneous. pp. 440, 442.

Appeal from Fulton Circuit Court; *Smith N. Stevens*, Judge.

Action by Walter E. McNeill against the Rochester Bridge Company and another. From a judgment for the plaintiff, the defendant appeals. *Reversed.*

*Holman, Bernetha & Bryant* and *M. A. Baker*, for appellants.

*Charles C. Campbell* and *Edward E. Murphy*, for appellee.

MYERS, J.—This is an action by appellee against appellants founded on an alleged deceit by false representations. Appellants’ separate demurrer to the complaint for want of facts was overruled, whereupon they answered by general denials. Trial by jury, verdict in favor of appellee for \$14,125, which during the pendency of the motion for a new trial was reduced by a remittitur to \$7,500. Each of the appellants for error



rely on the overruling of its demurrer to the complaint, and the overruling of its motion for a new trial.

In substance, it appears from the complaint that on May 7, 1913, appellant bridge company was engaged in operating a plant at Rochester, Indiana, in which by the use of various machines it prepared from steel plates structural work for steel bridges. Appellee on that date, and as an employe of the bridge company, was engaged in operating one of these machines, and while pursuing his work of punching holes in a steel plate a particle of steel was thrown off, striking him in his left eye, whereby he was permanently injured. On May 10 he was taken to a hospital at Rochester, Indiana, for treatment, where he remained about twenty days. On May 14, and while he was a patient at the hospital, he was taken to South Bend by the bridge company, and there examined by an X-ray expert. On May 23 appellee executed a contract whereby he received from the bridge company \$105 in full settlement for all damages incurred by reason of said injuries. On July 3 he resumed his work with the bridge company, but later, about October 1, on account of the injury to his eye, he returned to the hospital for further treatment, resulting in the removal of his eye. The latter part of October he recommenced work with the bridge company, but soon became weak, nervous and sick, and quit this employment.

The complaint also charges the bridge company with negligence in failing to furnish appellee with a reasonably safe punching machine, and in detail describes wherein the machine was defective and unfit for use; that the company negligently failed to keep a certain set screw inserted through one side of the groove block which was a part of the machine, and showing the purpose and use of this set screw which was also alleged to be out of repair, and no longer fit for the purpose for

which it was intended, also negligence in attempting to hold the screw in place by tying the same with cotton strings, all to the knowledge of the bridge company and unknown to appellee.

It also appears that at the time of the aforesaid injury the bridge company was insured by the appellant insurance company against loss by damage to life, health and body of the servants of which appellee was one. "That said bridge company and said insurance company, through their agents and servants, entered into a plan and conspiracy of deceit to cheat and defraud this plaintiff out of his said cause of action and damages, and immediately after said accident took place, and as a part of the plan, they took charge of the plaintiff, took him to the hospital and to an X-ray expert and employed physicians and medical attendants, and had him examined, cared for and treated to cure him if possible, if not to learn the extent of his injuries so they might further their plan of conspiracy, and on May 23, 1913, in pursuance of said plan, and while the plaintiff was still under said charge at said hospital and suffering great pain, both in mind and body, and could not see to read and was unfit to do business, they called upon the plaintiff at the hospital and stated to him that they had consulted physicians and knew that his injuries were only temporary; that his eye would be fully restored and would be well in a few days; that the X-ray showed there was nothing the matter with his eye; that his only damage would be the loss of a short period of time and compensation for medical services; that they were willing to make the plaintiff a donation of a sum equal to plaintiff's loss of time and cost of medical services for such temporary injuries; that if he went to court he could get no more than pay for such loss of time and medical services, and offered to pay this plaintiff for such loss of time \$105.00 and for said

medical services, and asked him to sign a receipt as evidencing a gratuity and not as a settlement. The plaintiff believed and relied on said statements as true, accepted said sum of \$105.00 and did sign a receipt. That the essential parts of said statements were false; that the plaintiff's injuries were and are permanent; that said receipt was a contract for a full settlement for all damages incurred by reason of said injuries with a consideration of \$196.00 of which the plaintiff never received more than \$105.00. That the plaintiff did not and could not know the contents of said receipt before bringing this action. That by reason of the facts stated herein, plaintiff lost his cause of action against said bridge company, and now brings this action as an action of deceit on said fraudulent settlement, and demands judgment for \$19,800.00, and all proper relief."

If this were an action to recover damages resulting from the negligence of appellant bridge company, the unrescinded contract of settlement which appel-

1. lee has affirmed would preclude a recovery, for the reason that that matter must be regarded as settled. *South Bend, etc., Gas Co. v. Jensen* (1914), 182 Ind. 557, 105 N. E. 774; *Indianapolis Abattoir Co. v. Bailey* (1913), 54 Ind. App. 370, 102 N. E. 970. The case at bar proceeds upon an entirely different theory. It is an action for damages resulting from the alleged fraud and deceit. It originated when appellee acted upon the alleged deceit charged to have been practiced upon him by appellants. By this form of action he affirms the contract of release and proceeds upon the principle announced in *Home Ins. Co. v. Howard* (1887), 111 Ind. 544, 13 N. E. 103; that "a person so circumstanced may retain what he has received and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damages resulted therefrom." See, also, *Michi-*

*gan, etc., Ins. Co. v. Naugle* (1891), 130 Ind. 79, 86, 29 N. E. 393; *Baker v. Becker* (1913), 153 Wis. 369, 381, 141 N. W. 304.

This principle has been frequently applied in fraud cases involving land deals, insurance settlements, and various other transactions, but seldom invoked in cases growing out of the settlement of damages for personal injuries. This may be accounted for on the ground that the measure of damages for deceit is not necessarily the amount which might be recovered in an action on the original tort, but it is the amount on which the parties might have agreed irrevocably in the absence of the alleged deceit, or had they alike known the facts upon which the settlement was made.

Appellants insist that the allegations in the complaint relied on to show fraud, for the most part, are mere expressions of opinion; that they were not statements of existing facts; that appellee had an equal opportunity with appellants to know or learn the facts; that he was in a better position to know his real condition than either of the appellants.

The complaint shows that appellants called upon him at the hospital and, among other things, "stated to him that they had consulted physicians and knew that his injuries were only temporary, and that his eye would be fully restored and would be well in a few days; that the X-ray showed there was nothing the matter with his eye; that his only damage would be the loss of a short period of time and the compensation for medical services." These statements are alleged to be false, but that plaintiff believed and relied on them as true, and accepted the sum of \$105 in settlement. The statements set forth in the pleading give some foundation for appellants' contention, but when the nature of the representations and meaning of the language used in the complaint as a whole is considered and applied to

the subject-matter here in controversy, the objections must fail. In the absence of a general rule applicable alike to all cases of fraud, each case, to a large extent, must be determined upon its own facts. The mere fact that a statement takes the form of an expression of opinion is not always conclusive, for, as the question is now presented, it must be interpreted by the facts and surrounding circumstances shown by the complaint. The rule that actionable fraud cannot be based upon the mere expression of an opinion has been qualified until now an expression of an opinion may amount to fraud, where it is a mere contrivance of fraud, or if the person to whom it was expressed has justly relied on it and has been misled, or when it is coupled with other circumstances. 12 R. C. L. 248, §16.

Considering the complaint as a whole, it charges appellants with fraud in procuring the contract of settlement. From this conclusion it may be said

3. as a general rule that "when a party to a contract is guilty of fraud, he commits a wrong for which he is liable to the defrauded party, to pay, at least, nominal damages." *Northrop v. Hill* (1874), 57 N. Y. 351, 15 Am. Rep. 501; *Isman v. Loring* (1909), 130 App. Div. 845, 115 N. Y. Supp. 933.

This rule would warrant us in holding the complaint good, for, if the complaint is good for nominal damages, and the trial court overrules a demurrer to it,

4. that ruling will be sustained on appeal. *Armstrong v. Dunn* (1896), 143 Ind. 433, 440, 41 N. E. 540; *Yorn v. Bracken* (1899), 153 Ind. 492, 495, 55 N. E. 257; *City of Indianapolis v. American, etc., Co.* (1911), 176 Ind. 510, 96 N. E. 608; *Halstead v. Stahl* (1910), 47 Ind. App. 600, 94 N. E. 1056; *Sebienske v. Downey* (1910), 47 Ind. App. 214, 93 N. E. 1050.

In the case at bar substantial damages are alleged. They are said to have resulted from the negligence of

the appellant bridge company; consequently the

5. complaint, in order to be sufficient to warrant a recovery of substantial damages, must show a valid claim against the bridge company for the
6. original tort. This is a necessary element of this action, for it is the basis upon which damages are estimated. Under the present liberal rules of pleading, it will be unnecessary for us to analyze the complaint in this particular, for the demurrer admits not only the facts directly and specifically alleged in the complaint but also all facts that can be implied from other allegations by reasonable and fair intendment. *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Vandalia Coal Co. v. Coakley* (1915), 184 Ind. 661, 111 N. E. 426.

We therefore conclude that the complaint in the instant case shows the essential elements necessary to state a cause of action. These elements are rep-

7. resentations, falsity, scienter, deception and injury. *Arthur v. Griswold* (1874), 55 N. Y. 400, 410; *Ochs v. Woods* (1917), 221 N. Y. 335, 117 N. E. 305; *Nash v. Minnesota Title, etc., Co.* (1895), 163 Mass. 574, 40 N. E. 1039. In *Haddock v. Osmer* (1897), 153 N. Y. 604, 608, 47 N. E. 923, the rule applicable to this case is stated as follows: "Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud." The demurrer to the complaint was properly overruled.

Appellants in support of their motion for a new trial insist that the court erred in giving to the jury certain

instructions requested by the appellee, and in refusing to give certain instructions requested by them, also that the damages assessed by the jury were excessive, and there was no evidence to support the verdict, and the same was contrary to law.

Upon a careful consideration of the record before us, we have concluded that this case was presented to the jury upon an erroneous theory. The instructions given to the jury clearly support this view.

The court, in substance, told the jury that before plaintiff could recover he must not only prove the allegations of his complaint with respect to the fraud which induced the settlement, but also prove his allegations of negligence, or any one of the acts of negligence which was the proximate cause of his injuries. We have no fault to find with the instructions in this respect, but on the question of the measure of damages the instruction proceeds upon the theory of an award as of the date of the trial, which will make the settlement an honest and fair one at that time. The instruction follows: "If you find for the plaintiff against the defendants, or either of them, you will fix the amount of damages he may be entitled to as against the defendant or defendants, as the case may be, against which you find. In fixing such damages, you may consider the character of the plaintiff's injuries, whether they are probably permanent, or only temporary in their character, how much pain or suffering, either physical or mental, he has undergone or will probably undergo on account of his injuries, any loss of time or earnings he has sustained or will probably sustain on account of them, any reasonable expenses he has incurred or will probably incur in treating them, his expectancy in life if you find such injuries are permanent; and award him such damages as you believe will make the settlement in question an honest and fair one, which award of dam-

ages by you should be the difference between the amount in the settlement and the actual value of the damages surrendered by such settlement not, however, exceeding the amount named in the complaint." This instruction was erroneous, in that the jury was given an erroneous basis for determining the measure of damages in case they found for the plaintiff.

The case of *Urtz v. N. Y., etc., R. Co.* (1911), 202 N. Y. 170, 95 N. E. 711, was an action to recover damages on account of fraudulent representations whereby the plaintiff was induced to settle her claim for damages against the defendant for the negligent killing of her husband at a highway crossing of defendant's railroad. Preliminary to a statement of the rule concerning the measure of damages, the court by Collin, J. said: "The basic principle underlying all rules for the measurement of damages in actions for fraud and deceit is indemnity for the actual pecuniary loss sustained as the direct result of the wrong. (*Krumm v. Beach*, 96 N. Y. 398.) Neither advantage nor disadvantage resulting to the plaintiff from the settlement enters in any way into our consideration. The question is what was the value of that with which plaintiff parted and what was the value of that which she received? \* \* \* In case the right of action had no value, she had gained by the transaction and was not injured. It had no value whatever if the true state of facts disclosed that it was an invalid and nonexistent claim or, in other words, that the defendant was not negligent, or, if the defendant was negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. \* \* \* An alleged value of



the claim based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim, is of a nature too speculative and wagering to be recognized by the law in this action for fraud. The jury in considering the question of damages should first ascertain whether or not the plaintiff was originally entitled to a recovery of some amount. \* \* \* If the jury determine that she was not originally entitled to recover, then their verdict would be for the defendant. If they determine that she was entitled to recover, then they would proceed to measure the damages and the rule by which they should be guided therein has been clearly expressed by us in *Gould v. Cayuga County National Bank* (99 N. Y. 333). Assuming that the parties meant to avoid litigation and compromise their dispute, and that the true facts and defendant's contradiction of them were disclosed, how much could the plaintiff have reasonably demanded and the defendant reasonably have allowed as a final compromise above and beyond the \$500, in fact allowed and received? That the jury must answer. They would take into view the probabilities of the successful enforcement of the cause of action, the probable extent and expense of the expected litigation over this disputed claim, the law's delays, the probability of the continuing solvency of the defendant and such other facts pertinent to the question of damages as the evidence presented. What under all the conditions and circumstances was this claim of the plaintiff, valid under the true, yet opposed and contradicted, state of facts, worth for purpose of sale, transfer or cancellation, if anything at all, above the five hundred dollars."

We have said the compromise and settlement of the original tort stands. The fraud, if any, was committed on the day the settlement was made. By affirming the settlement, the willingness on the part of

appellee to compromise his claim against appellant affirmatively appears. The question then is, What amount in excess of what appellee received was he reasonably entitled to in view of all the facts and circumstances fairly within the contemplation of the parties at the time the settlement was made? The basic principle underlying all rules for the measure of damages for fraud is indemnity for the actual loss sustained as a direct result of the wrong. Applying that principle to the instant case, if it be found that through fraud and deceit a compromise was procured of a valid claim in dispute, the measure of damages would be the amount which the injured party reasonably could have demanded, and the defendant would reasonably have allowed as a final compromise above and beyond the sum in fact allowed and received. *Ishie v. Norton Co.* (1918), 183 App. Div. 94, 170 N. Y. Supp. 655.

In our view of the instant case, it belongs to that class where the settlement of the original tort must be considered as having been had on what was then known and could have been reasonably foreseen as the probable effect of the injury according to the usual course of events and general experience.

In *Indiana Steel, etc., Co. v. Studes* (1918), 187 Ind. 468, 119 N. E. 2, no question was raised or decided relative to the rule for the measure of damages.

Judgment reversed, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 122 N. E. 662. See under (1) 20 Cyc 90; (2) 20 Cyc 18; (3) 20 Cyc 142; (5) 20 Cyc 102; (7) 20 Cyc 98; (8) 20 Cyc 27.

## ARBUCKLE v. STATE OF INDIANA.

[No. 23,422. Filed October 7, 1919.]

1. **CARRIERS.**—*Rate Schedule for Continuous Journey.*—*Validity.*—A provision in a rate schedule prohibiting a passenger from choosing a combination of fares between intervening points instead of the through rate, upon its approval by the Public Service Commission, became binding upon the carrier and its passengers, and justified a conductor in demanding of a passenger, upon the same train, who had paid his way to an intermediate point and presented a ticket for carriage from there to destination, the additional amount necessary to make up the through fare as scheduled. p. 445.
2. **CARRIERS.**—*Passenger's Intent to Make Continuous Journey.*—*Evidence.*—An arrangement made by a passenger by telephone with the carrier's agent at an intermediate point, before entering the car at the initial point, for the purchase of a ticket for carriage from the intermediate point to destination, indicates a determination to make a continuous journey on the same car, notwithstanding his statement that he intended to leave the car at the intermediate point to get the ticket. p. 446.
3. **CARRIERS.**—*Forcible Removal of Passenger.*—*When Justified.*—*Assault and Battery.*—Where a passenger paid his fare to an intermediate point of an intended continuous journey and presented a ticket for the remaining distance and refused to pay an additional sum to make up the through fare required by a schedule approved by the Public Service Commission, which schedule prohibited the choosing of a combination of fares between intervening points, the conductor was justified in ejecting the passenger, upon his refusal to voluntarily leave the car. p. 447.

From Shelby Circuit Court; *Alonzo Blair*, Judge.

Prosecution by the State of Indiana against E. O. Arbuckle. From a judgment of conviction, the defendant appeals. *Reversed.*

*Joseph R. Morgan*, *Ed K. Adams* and *Herbert C. Jones*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

HARVEY, J.—The defendant was convicted by a jury on a charge of assault and battery upon the prosecuting witness, one William W. Wilcoxon. The defendant, as conductor of a car on the Indianapolis and Cincinnati Traction Company's line, ejected therefrom said Wilcoxon for refusal to pay the rate of passenger fare requested by said conductor for a trip from Gwynneville to Indianapolis.

Wilcoxon entered the car at Gwynneville, Indiana, to travel thereon as a passenger from said point to Indianapolis. He paid the scheduled and demanded fare of five cents for passage from Gwynneville to Morristown, and at the latter point paid to the station agent the scheduled rate for a ticket to Indianapolis for transportation on the same car. The combined fares above mentioned aggregate fifty-eight cents; whereas the through fare from Gwynneville to Indianapolis at said time was fifty-nine cents. The defendant, as conductor, demanded of Wilcoxon one cent cash in addition to the ticket, which additional amount Wilcoxon refused to pay.

The rate of fare stated above between said points, both local and through, were fixed in a schedule filed by the traction company with and approved by the

1. Public Service Commission of Indiana, and were published according to law. The scheduled rates were the same whether the passenger purchased a ticket or paid cash. The prosecutor does not question the legality or reasonableness of said rates, or any regulation in reference thereto. On the other hand, the prosecution indirectly concedes said rates and regulations to be legal and reasonable, and asserts that, as the schedule named three rates, a through rate, a rate from Gwynneville to Morristown, and a rate from Morristown to Indianapolis, the passenger had a right to choose how he would make the trip, whether as a through passenger

or by stages, paying only the scheduled rates for such passage.

There was, nowever, a provision in the schedule filed with the commission, which is as follows:

"The tariff fare as shown herein must be paid from the point where passenger boards the train to final destination. This may not be avoided by the payment of fare to or from an intermediate point, or points, so as to make a combination of fares less than the fare for the entire ride. Should a passenger desire to proceed on the same train to any point beyond which the fare already paid will entitle him to ride, he must pay fare from the station where he originally boarded the train to final destination."

This was also approved by the commission, and thereby became a regulation binding upon the traction company and its passengers until successfully challenged or changed. No such rule or regulation was involved in the case of *Brown v. Terre Haute, etc., Traction Co.* (1916), 63 Ind. App. 327, 110 N. E. 703, 113 N. E. 313, and this fact distinguishes that decision from the case here involved. This rule prohibited the passenger from choosing a combination of rates, as here attempted, and the conductor was justified in demanding the extra amount needed to make the full scheduled fare from Gwynneville to Indianapolis for an intended continuous trip on the same car. Beale and Wyman, *Railroad Rate Reg.* (3d ed.) §675; 2 Wyman, *Public Ser. Corp.* §§1255, 1256, 1260; 2 Hutchinson, *Carriers* (3d ed.) §1042; *Wabash R. Co. v. Priddy* (1912), 179 Ind. 483, 101 N. E. 724.

The arrangement made by the passenger by telephone with the agent at Morristown, before he entered the car at Gwynneville, clearly indicates his deter-

2. mination to make a continuous journey on the same car, notwithstanding his statement that he

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Hinshaw v. State—188 Ind. 447.

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intended to leave the car at Morristown and get the ticket ordered by telephone.

There is no controversy between the parties as to the facts above recited. The conductor was justified in removing the passenger from the car upon the pas-

3. senger's refusal to voluntarily leave the car. The court refused to give tendered instructions in accord with the law above announced, and gave, of its own motion, instructions to the contrary. This was error, and for this error the judgment is reversed, with instructions to sustain the motion for new trial.

NOTE.—Reported in 124 N. E. 395. See under (1) 10 C. J. 652; (3) 10 C. J. 731. Carriers, right of, to eject passengers for failure to pay required extra fare, 10 Ann. Cas. 923, Ann. Cas. 1913A 1198.

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## HINSHAW v. STATE OF INDIANA.

[No. 23,168. Filed October 7, 1919.]

1. **BANKS AND BANKING.—Indictment.—Overdraft by Banker.—Facts and Conclusions.**—In an indictment, under §2295 Burns 1914, Acts 1905 p. 584, allegations that on a certain date the accused was president and director of a certain incorporated bank, doing business in a named county of the state, and that he did then and there feloniously, unlawfully and knowingly overdraw his account in such bank, are not conclusions, but statements of the material facts necessary to constitute the offense defined in the first clause of such section. p. 452.
2. **BANKS AND BANKING.—Indictment.—Charging Officer Having No Credit with Drawing Check.**—The statement in an indictment of a bank official for drawing and receiving a check in violation of §2295 Burns 1914, Acts 1905 p. 584, that the defendant "knew at the time that he had no funds to his credit" was sufficient to charge that the defendant had no funds to his credit therein and knew that he had none. p. 452.
3. **INDICTMENT AND INFORMATION.—Sufficiency.**—An indictment charging an offense with such degree of certainty that the court can pronounce judgment thereon according to the right of the case is sufficient. p. 453.

4. **INDICTMENT AND INFORMATION.**—*Charging Statutory Offense.—Sufficiency.*—An indictment based on a statute must, with certainty and precision, charge the defendant with having committed or omitted the acts, under the circumstances, and with the intent, mentioned in the statute. p. 453.
5. **INDICTMENT AND INFORMATION.**—*Description of Money.—Sufficiency.*—In a prosecution of a bank official for a violation of §2295 Burns 1914, Acts 1905 p. 584, the description of money called for in a check described in the indictment as “Three Thousand (\$3,000) Dollars lawful and current money of the United States,” was sufficient, in view of §2058 Burns 1914, Acts 1905 p. 584. p. 455.
6. **INDICTMENT AND INFORMATION.**—*Motions to Make More Specific.*—Motions requiring the state to make indictments or affidavits more specific, and to state facts necessary to sustain conclusions or recitals, are not recognized by the Criminal Code. p. 455.
7. **INDICTMENT AND INFORMATION.**—*Different Felonies of Same Class.—How Charged.*—Felonies of the same class should be charged in separate counts of an indictment. p. 455.
8. **INDICTMENT AND INFORMATION.**—*Several Counts Based on Same Felony.—Election.*—Where several counts of an indictment based on the same alleged felony are inserted to avoid the consequences of a possible variance, it is not error to overrule a motion requiring the prosecution to elect. p. 456.
9. **INDICTMENT AND INFORMATION.**—*Election Between Counts.—Discretion of Court.*—Whether prosecution should be required to elect between different counts of an indictment is largely within the court's discretion; and when it is not apparent on the face of an indictment that different and distinct offenses, which cannot be properly joined, are charged, election need not be required. p. 456.
10. **INDICTMENT AND INFORMATION.**—*Joinder of Cognate Offenses.—Rule.*—Any number of counts charging the same transaction as constituting different offenses may be joined, if the offenses are cognate or of the same nature, and the mode of trial is the same. p. 456.
11. **CRIMINAL LAW.**—*Appeal.—Review.—Ruling on Motion for Change of Venue.*—The ruling of the trial court on a motion for change of venue, as to the existence of excitement and prejudice, is a determination of an issue of fact and is conclusive on appeal. p. 457.
12. **CRIMINAL LAW.**—*Appeal.—Denial of Change of Venue.—Discretion of Court.*—It cannot be said that the trial court abused its discretion in denying a change of venue, based on the ground that publications had excited and prejudiced the people

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Hinshaw v. State—188 Ind. 447.

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- against the defendant, where the record fails to show that copies of the publications, or the substance thereof, were presented to the trial court, the defendant stating only his opinion as to the effect thereof. p. 458.
13. CRIMINAL LAW.—*Appeal.—Instructions.—Presumptions.*—Since it is the duty of the court to instruct in writing when requested, the presumption on appeal is that the court did its duty, in the absence of a contrary showing. p. 458.
14. CRIMINAL LAW.—*Appeal.—Bill of Exceptions.—Certification.*—A bill of exceptions certified by the trial court imports absolute verity. p. 458.
15. CRIMINAL LAW.—*Instructions.—Duty of Jurors.*—An instruction making it the duty of each juror to consult and deliberate with his fellow jurors, and stating that if any juror, after considering all the evidence, the argument of counsel, the instructions of the court, and after having fully consulted and deliberated with his fellow jurors, should be convinced beyond a reasonable doubt of the defendant's guilt as charged, it would be his duty to refrain from voting for an acquittal, or, if not so convinced, after having performed such duties, it would be his duty to refuse to vote for conviction, was not objectionable on the ground that it told each juror that, if, after deliberation, he once arrived at a conclusion of the defendant's guilt, it was his duty thereafter to refrain from voting for acquittal. p. 459.
16. CRIMINAL LAW.—*Instructions Considered as a Whole.—Reasonable Doubt.*—An instruction on the subject of reasonable doubt, though incomplete, was not erroneous, when considered with another instruction that fully stated the law on the subject. p. 460.
17. CRIMINAL LAW.—*Instructions.—Right of Jury to Determine Law.*—An instruction on the right of the jury to determine the law and its duty to consider instructions, is reviewed and held not objectionable as taking from the jury its freedom to judge the law, on the authority of *Blaker v. State*, 130 Ind. 203. p. 461.
18. BANKS AND BANKING.—*Officer Drawing Check Without Credit.*—The offense defined in §2295, cl. 2, Burns 1914, Acts 1905 p. 584, was complete, if an officer of a bank having no funds to his credit therein indorsed a check payable to himself, presented it to another institution and from it received payment or credit thereon. p. 461.
19. BANKS AND BANKING.—*Official Drawing Check Without Credit.—Sufficiency of Evidence.—Criminal Law.*—In the prosecution of a bank official for drawing and receiving payment of a check in violation of §2295, cl. 2, Burns 1914, Acts 1905 p. VOL. 188—29



584, the state, in order to convict, must prove that the defendant had *no funds* to his credit in the bank at the time of drawing and receiving payment on the check, and evidence failing to show when the check was drawn, or that at the time of receiving payment thereon the defendant had no funds to his credit in the bank, is insufficient to sustain a conviction. p. 462.

From Hamilton Circuit Court; *Fred E. Hines*, Special Judge.

Prosecution by the State of Indiana against John L. Hinshaw. From a judgment of conviction, the defendant appeals. *Reversed.*

*Ira W. Christian, Floyd G. Christian, Ed V. Fitzpatrick, W. D. Fitzpatrick, and Ralph H. Waltz*, for appellant.

*Ele Stansbury*, Attorney-General, *U. S. Lesh, Edward M. White, Elmer E. Hastings and Dale F. Stansbury*, for the state.

WILLOUGHBY, J.—This is an appeal from a conviction in a criminal prosecution brought by indictment in two counts. In the first count of said indictment the appellant was charged with feloniously, unlawfully and knowingly overdrawing his account in the People's State Bank of Arcadia, Indiana, while being then and there president and director of the said bank, contrary to §2295 Burns 1914, Acts 1905 p. 584, §402; and in the second count of said indictment the appellant was charged with feloniously, unlawfully and knowingly drawing and receiving payment of a check on said bank when the appellant knew at the time that he had no funds to his credit in said bank, and that at the time the appellant did not have the written consent thereto of the board of directors, manager or managers of said bank indorsed on said check, contrary to §2295 Burns 1914, *supra*. The statute under which said indictment is found, §2295 Burns 1914, *supra*, reads as follows: "Whoever, being president, director, cashier, teller,

clerk, officer or employe of any incorporated bank, or of any firm, corporation, person or association doing a banking business, shall knowingly overdraw his account in such bank, or in such other institution doing a banking business, or who shall knowingly draw and receive payment on any check on such bank, firm, corporation, person or banking association when he has no funds to his credit therein without first procuring the written consent thereto of the board of directors of any such incorporated bank, or the manager, or managers of any such firm, corporation, person or association doing a banking business, indorsed on such check, shall be deemed guilty of a felony, and on conviction, shall be imprisoned in the state prison not less than two years nor more than fourteen years, and fined in double the sum so received."

Appellant in his brief setting out errors relied on for reversal enumerates forty-six alleged errors, but they may all be properly discussed under two heads, viz.: Overruling appellant's separate and several motion to quash each count of the indictment, and overruling appellant's motion for a new trial.

The defendant, in his motion to quash, attacks the sufficiency of the indictment and each count thereof, and says that the facts stated in the indictment, and each count thereof, separately, do not constitute a public offense. That the indictment, and each count thereof, contains matter which, if true, would constitute a legal justification of the offense charged and a legal bar to the prosecution, and that the indictment, and each count thereof, does not state the offense with sufficient certainty, and proceeds upon no definite theory.

It will be observed that §2295 Burns 1914, *supra*, defines two felonies. The first clause of said section provides that if the president, director, cashier, teller, clerk, officer or employe of any incorporated bank or of any

firm, corporation, person or association doing a banking business, shall knowingly overdraw his account in such bank, or in such other institution doing a banking business, he shall be deemed guilty of a felony. And in the second clause of said section it is provided that any such person who shall knowingly draw and receive payment on any check on such bank, firm, corporation, person or banking association, when he had no funds to his credit therein, without first procuring the written consent thereto of the board of directors of any such incorporated bank or the manager, or managers of any such firm, corporation, person or association doing a banking business, indorsed on such check, shall be deemed guilty of a felony.

In the first count of the indictment, after the formal parts, it alleges that the defendant, John L. Hinshaw, on or about March 10, 1914, at Hamilton county,

1. in the State of Indiana, was then and there president and director of a certain incorporated bank doing a banking business in said Hamilton county, in the State of Indiana, to wit, People's State Bank, and did then and there feloniously, unlawfully and knowingly overdraw his account in said bank. This is a statement of every material fact necessary to constitute the felony defined in the first clause of said §2295 Burns 1914, *supra*, and the said allegations are statements of fact and not conclusions.

The second count, by allegations of fact, charges the defendant with the commission of every act constituting the commission of a felony as defined by the sec-

2. ond clause of §2295 Burns 1914, *supra*. It is claimed by appellant that this count of indictment alleges that the defendant "knew at the time he had no funds to his credit in said bank," but that said count of said indictment does not say that he had no funds to his credit in said bank. We think the only reasonable con-

struction that can be put on the expression that "appellant knew at the time that he had no funds to his credit in said bank" is that he had no funds to his credit in said bank, and knew he had none. Said second count of the indictment also avers that, at the time, the said John L. Hinshaw did not have the written consent thereto of the board of directors, manager, or managers of the bank indorsed on said check.

It will thus be seen that the offense is set forth in substantially the language of the statute in each count of the indictment, and the charge in each count

3. is made in language clear and unequivocal. The indictment, and each count thereof, charges the offense with such degree of certainty that the court could pronounce judgment according to the right of the case, and is therefore sufficient. §2062 Burns 1914, Acts 1905 p. 584, §191. An indictment so framed as to inform the defendant of the charge which he is required to meet is sufficient. *Brunaugh v. State* (1909), 173 Ind. 483, 90 N. E. 1019.

In relation to offenses created by statute, the statute contains a definition of the offense. The offense consists in the commission of certain acts under

4. specified circumstances and, in some cases, with particular intent; and an indictment founded on the statute must, with certainty and precision, charge the defendant with having committed or omitted the acts, under the circumstances, and with the intent, mentioned in the statute. Archbold, Crim. Pl. (1st Am. ed.) 23; *State v. Stimson* (1853), 24 N. J. Law 1, 23.

The appellant contends that the same rules of pleading should apply in this case as are applicable in cases of embezzlement, and cites in support of such contention: *State v. Winstandley* (1899), 154 Ind. 443, 57 N. E. 109; *State v. Winstandley* (1900), 155 Ind. 290, 58 N. E. 71; *Sherrick v. State* (1906), 167 Ind. 345, 79

N. E. 193; *Vinnedge v. State* (1906), 167 Ind. 415, 79 N. E. 353; *Wright v. State* (1907), 168 Ind. 643, 81 N. E. 660. These cases are not applicable, because they were prosecutions under statutes declaring the charged offense to be embezzlement.

The case of *Moore v. United States* (1895), 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, was a prosecution for embezzlement, and in that case it was held that to make a good charge for embezzlement all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant clearly within the statute. If that can be done by simply following the words of the statute, that will do; if not, other allegations must be used. In the case of *United States v. Northway* (1886), 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, it was held that the word "embezzle" was recognized as having a settled technical meaning of its own.

In the case of *State v. Winstandley* (154 Ind. 443), *supra*, it was held that the same rules of pleading applicable in the prosecution of an official for embezzlement are to be accepted in determining the sufficiency of an indictment against bank officials for receiving bank deposits when the bank is insolvent.

In *Hinshaw v. State* (1918), *ante* 147, 122 N. E. 418, the court, in commenting on §2294 Burns 1914, Acts 1907 p. 14, the section of statute upon which that prosecution was founded, said: "It will be noted that the legislature in defining the crime says that whoever takes a deposit under the conditions designated in the statute shall be deemed guilty of 'embezzlement.' The judicial interpretation of this statute had been that the legislature intended that the requisites of pleading with reference to embezzlement were to be applied in determining the validity of indictments under this statute. It is fundamental that, in embezzlements, the tak-

*ing* and *receiving* part of the charge must be connected and coupled with the statement that such *taking* and *receiving* was by virtue of the office, or the agency, or the employment. These principles of pleading were well established before the act in question was passed by the legislature; and this particular act has been interpreted by this court. *State v. Winstandley* (1899), 154 Ind. 443, 57 N. E. 109; *State v. Winstandley* (1899), 155 Ind. 290, 58 N. E. 71; *Vinnedge v. State* (1906), 167 Ind. 415, 79 N. E. 353; *Wright v. State* (1907), 168 Ind. 643, 81 N. E. 660."

In the present case the offense charged is not defined as embezzlement. Therefore said decisions cited by appellant can have no force in determining the suf-

5. ficiency of the indictment. The description of the money called for in the check, described in the second count of the indictment as "Three Thousand (\$3,000) Dollars lawful and current money of the United States," was a sufficient description of the money called for in said check. §2058 Burns 1914, Acts 1905 p. 584, §187. *Riggs v. State* (1885), 104 Ind. 261, 3 N. E. 886.

The motions to require the state to make an indictment or affidavit more specific, and to state facts necessary to sustain conclusions or recitals in an in-

6. dictment, are not recognized by the criminal laws and practice of this state. *Sherrick v. State*, *supra*; *Hinshaw v. State*, *supra*. Therefore no error was committed by the trial court in overruling such motions.

The appellant contends that the court erred in overruling appellant's motion to require the state to elect as to which count of the indictment it would rely

7. upon for conviction. We see no good reason for this contention. It is proper, where felonies be-

long to the same class, to have separate counts

8. in the indictment covering each; and the statute provides that a felony may be charged in separate counts in the same indictment to have been committed by different means. *Griffith v. State* (1871), 36 Ind. 406; *State v. Balsley* (1902), 159 Ind. 395, 65 N. E. 185. Where, in an indictment of more than one count, the several counts are evidently based on the same alleged felony and inserted to avoid the consequences of a possible variance, it is not error to overrule a motion to require the prosecuting attorney to elect on which count he will try the defendant. *Wall v. State* (1875), 51 Ind. 453.

The question as to whether or not the prosecuting attorney should be required to elect and designate the count of the indictment upon which he will proceed is a matter largely within the discretion of the trial court, and when it is not apparent on the face of the indictment that different and distinct offenses, which cannot be properly joined, are charged, election need not be required. *Glover v. State* (1887), 109 Ind. 391, 10 N. E. 282; *Joy v. State* (1860), 14 Ind. 139.

Any number of counts charging the same transaction as constituting different offenses may be joined, provided the offenses charged are cognate or of the

10. same nature, and the mode of trial is the same, but not otherwise. Any number of counts charging the same offense in different ways may be joined in the same indictment in order to meet the evidence and avoid a variance in proof, and the prosecutor cannot be required to elect upon which count he will proceed. *Clark*, Crim. Proc. 286. The offenses charged in the separate counts of this indictment belong to the same class, and the prosecuting attorney was not required to elect upon which count he would proceed. *Joy*

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Hinshaw v. State—188 Ind. 447.

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*v. State, supra; Griffith v. State, supra; Wall v. State, supra; State v. Balsley, supra; 17 C. J. 286, §3624.* This is a case in which the same act is the foundation of the charge in each count of the indictment, and the court did not err in overruling the motion of appellant to require the state to elect upon which count of the indictment it would rely for conviction. *State v. Balsley, supra; Wall v. State, supra.*

The defendant filed a motion, verified by his affidavit, for a change of venue from Hamilton county on account of excitement and prejudice against him in that

11. county. The state filed the counter-affidavits of nine persons who stated that they had a general acquaintance with the people, citizens and inhabitants of said county, through all parts of said county, and that there is no such excitement or prejudice in said county, or any part thereof, against said defendant as would prevent said defendant from receiving a fair trial of said cause in Hamilton county, and specifically denied each statement of fact contained in defendant's affidavit. An issue of fact determined by the trial court upon conflicting affidavits is conclusive upon this court. *Conrad v. State* (1896), 144 Ind. 290, 43 N. E. 221, and cases there cited.

In defendant's affidavit and motion for a change of venue from the county he states that the Noblesville Daily Ledger, and the Hamilton County Times printed and published in the English language, in the city of Noblesville, Hamilton county, Indiana, and every newspaper of general circulation published in the English language in said Hamilton county, and read by a great majority of the citizens of Hamilton county, have published, from time to time, in said newspapers, statements and circumstances connected with the failure of the Hamilton Trust Company, Farmers' and Merchants' Bank of Cicero, and the People's State Bank of Arcadia,



all of said county, which were intended to and did inflame and excite the citizens of said county against the defendant and against his cause of defense in this action.

There is no copy of the publications complained of set forth in said affidavit. There was no attempt to state the substance of said publications in said

12. affidavit and, so far as the record shows, no copies thereof were furnished to enable the court to determine what the effect of such publications would likely be on the citizens of said county, and this court cannot say that the trial court abused its discretion in refusing to adopt the opinion of the defendant as to the effect of such publications. The record does not show any abuse of judicial discretion in overruling defendant's motion for a change of venue from the county. *Hinkle v. State* (1910), 174 Ind. 276, 91 N. E. 1090; *Leach v. State* (1911), 177 Ind. 234, 97 N. E. 792.

Appellant contends that the court erred in instructing the jury orally and also in reading from the statute as part of the instructions. The instructions are

13. brought into the record by bill of exceptions No. 1, and a careful examination of that bill of exceptions does not show the giving of any oral in-

14. structions, or reading from the statute book to the jury, as part of the instructions. It shows a request for instructions in writing. It sets forth all the instructions given and those tendered by defendant and refused, and shows objections and exceptions, but does not show any oral instructions given, or statute, or statutes, read by the court to the jury as part of the instructions; and near the close of said bill of exceptions it says: "Said instructions as above stated to have been given were all that were given to the jury at the trial of said cause." It being the duty of the court to instruct in writing when so requested, and nothing appearing to the contrary, this court must presume that

the trial court did its duty. The bill of exceptions shows that no oral instructions were given, or statutes read, as part of the instructions. The bill of exceptions is certified by the trial court and imports absolute verity. *Vivian Collieries Co. v. Cahall* (1915), 184 Ind. 473, 110 N. E. 672.

Appellant contends that the court erred in giving of its own motion instruction No. 7, and in support of his contention sets out a part only of said instruction. 15. tion, and asserts that by said instruction the court, in effect, told each juror that if, after deliberation, he once arrived at a conclusion of the defendant's guilt, thereafter it was his duty to refrain from voting for an acquittal of the defendant.

Said instruction will not bear the construction so placed upon it by appellant. Said instruction reads as follows: "Each juror acts for himself in coming to a conclusion, and acts on his own conviction. If therefore, any juror in this cause, after considering all the evidence, the argument of counsel on both sides, and the instructions of the court, and then having consulted and deliberated with his fellow jurors, should yet not be convinced beyond a reasonable doubt of the defendant's guilt, it would be his duty to refuse to vote for a conviction. And on the other hand, if any juror, after considering all the evidence, the argument of counsel on both sides, the instructions of the court, and after having fully consulted and deliberated with his fellow jurors, should be convinced, by the evidence beyond a reasonable doubt, of the defendant's guilt as charged, it would be his duty to refrain from voting for an acquittal of the defendant. But it is the duty of each juror to consult and deliberate with his fellow jurors of and concerning the verdict."

Appellant contends that the court erred in giving of its own motion instruction No. 8, and says that it

is not a proper instruction on reasonable doubt.

16. Said instruction reads as follows: "It is not every doubt however that is a reasonable one. You are not warranted in considering as reasonable those doubts that may be merely speculative, or products of the imagination. A reasonable doubt arises, or exists in the mind, naturally, as a result of the evidence or lack of evidence."

This instruction is not erroneous, but is incomplete as an instruction on reasonable doubt, but, when read in connection with instruction No. 9, given by the court of its own motion, the two instructions taken together make a sufficient instruction on the subject of reasonable doubt. Said instruction No. 9 reads as follows: "The rule of law touching reasonable doubt is a practical rule, intended to guide practical jurors when engaged in the serious and important duty of administering justice. There is nothing in it that is mysterious, or fanciful. It does not furnish a shield for those actually guilty, whereby to escape merited punishment. It does not contemplate absolute or mathematical certainty. Despite every precaution that may be taken to prevent it, there may be, in all matters depending on human testimony for proof, a mere possibility of error. But in this case, if you are so convinced by the evidence, of whatever class it may be, and considering all the facts and circumstances in evidence as a whole, of the guilt of this defendant as charged, that, as prudent men you would feel safe to act upon such conviction, in matters of the highest concern and importance to your own dearest and most important interests, under circumstances where there was no compulsion or coercion upon you to act at all, then you will have attained such a degree of certainty as excludes reasonable doubt and authorizes conviction." The giving of said Instruction No. 8 was not error.

The appellant contends that the court erred in giving of its own motion instruction No. 11, and claims that said instruction took from the jury its free-

17. dom to judge the law. Said instruction reads as follows: "This is a criminal prosecution. A statute of this state requires the court in such cases to charge the jury, and in such charge to state all matters of law which are necessary for their information in giving their verdict; and these instructions are given by the court in compliance with that statute. However, the Constitution of Indiana provides that in all criminal cases, whatsoever, the jury shall have the right to determine the law, conferred on you by the Constitution, gives you the right to determine and construe the law for yourselves, although your determination may differ from that stated by the court in its instructions; but in determining the law it is your sworn duty to determine it correctly, and as it in fact is, whatever may be the source of your information, or the basis of your conclusion. It is your duty to consider and weigh the instructions given you by the court, and not arbitrarily, and without what you regard as a proper and sufficient reason, reject them; and when your determination shall have been reached, it should be with the conscientious conviction that you have, so far as you were able, correctly determined the law, as it in fact is." This instruction was not erroneous. A similar instruction was held to be correct in the case of *Blaker v. State* (1892), 130 Ind. 203, 29 N. E. 1077.

The appellant asserts that the verdict of the jury is not sustained by sufficient evidence, and that for this reason the cause should be reversed. The jury

18. by their verdict found the defendant guilty as charged in the second count of the indictment. The evidence shows a check drawn by appellant on the People's State Bank of Arcadia, Indiana, dated March

10, 1914, payable to himself in the sum of \$3,000 indorsed in blank by appellant and by the Hamilton Trust Company to the Indiana State Bank, of Indianapolis, Indiana, and by the latter to any bank, banker, or trust company, and stamped "paid" by the People's State Bank under date of March 14, 1914. Said check did not have the written consent of the board of directors, manager, or managers of said bank indorsed on it authorizing the appellant to draw it. It may be inferred from the evidence that the defendant presented the check to the Hamilton Trust Company and cashed it, or got credit for the same, and if he did so receive payment on said check, and had no funds to his credit at the People's State Bank of Arcadia at the time he so received payment, the offense was complete, and he was guilty as charged in the second count of the indictment. Whether he had no funds in said bank to his credit at said time that he so received payment in cash, or by credit on his account, was a material fact in said case.

The state, in its brief, says on that point: "The evidence shows that appellant knowingly drew and received payment on a certain check issued against

19. the People's State Bank, and that he did not have *sufficient funds* to his credit in said bank to pay the check at the time it was issued or at the time it was presented." This is not enough. In order to sustain a conviction on the second count of this indictment the state must show that the defendant had *no funds* to his credit in said bank at the time he drew and received payment on the check named in the indictment. If the defendant, at said time, had some funds to his credit in said bank, but not sufficient to pay said check, he could not be convicted under the second count of said indictment. We are unable to ascertain from the evidence when appellant received from said Hamilton Trust Company such payment of said check, or whether at

the time he received such payment he had no funds to his credit in the People's State Bank of Arcadia. It being essential and necessary, to sustain a verdict on the second count of said indictment, for the evidence to show that the defendant, at the time he received payment on said check, had no funds to his credit in the People's State Bank of Arcadia, and, the state wholly failing to adduce any evidence to sustain such fact, and there being no such evidence in the record, we are required to hold that the verdict is not sustained by sufficient evidence, and the judgment must be reversed. Other alleged errors are discussed in appellant's brief, but, as they will not likely arise on a new trial of the cause, it is not necessary to extend this opinion by discussing them.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 124 N. E. 458. Banks and banking: construction of statute prescribing form of indictment for violation of banking law, Ann. Cas. 1918C 558. See under (9, 10) 22 Cyc 404, 405; 17 C. J. 282; (18, 19) 7 C. J. 574.

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### SCHULMEYER v. STATE OF INDIANA.

[No. 23,544. Filed October 14, 1919.]

1. CRIMINAL LAW.—*Illegal Sale of Intoxicating Liquors.—Affidavit.—Sufficiency.*—An affidavit in a city court, under §8356d Burns' Supp. 1914, Acts 1917 p. 15, charging that the defendant, on a certain date, unlawfully kept intoxicating liquors in the city, county and state with intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons unknown within the state, being in the language of the statute, is not objectionable on the ground that it fails to charge that such liquors were kept for sale within the state: p. 465.
2. INTOXICATING LIQUORS.—*Illegal Sale.—Sufficiency of Evidence.*—In a prosecution for the illegal sale of intoxicating liq-

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Schulmeyer v. State—188 Ind. 463.

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uors, under §8356d Burns' Supp. 1914, Acts 1917 p. 15, the evidence, though circumstantial, is *held* sufficient to show that the defendant unlawfully kept, and was making unlawful sales of, intoxicating liquors as charged, in view of the rule that a verdict supported by some evidence is supported by sufficient evidence. p. 466.

3. CRIMINAL LAW.—*Appeal.—Sufficiency of Evidence.*—In determining the sufficiency of the evidence to support the verdict, or the finding, the court on appeal will consider not only the positive testimony of witnesses but also such inferences as flow naturally from the facts established. p. 466.

From the Marion Criminal Court (49,081) ; *John F. Robbins*, Judge *pro tem*.

Prosecution by the State of Indiana against John Schulmeyer. From a judgment of conviction, the defendant appeals. *Affirmed*.

*R. R. Dalton*, for appellant.

*Ele Stansbury*, Attorney-General, and *Edward M. White*, for the state.

WILLOUGHBY, J.—This was a prosecution by affidavit commenced in the city court of the city of Indianapolis under §8356d Burns' Supp. 1918, §4, chapter 4, Acts 1917 p. 15, which resulted in a trial and finding in such city court of guilty as charged. The appellant appealed to the criminal court of Marion county, and was there tried by the court without a jury, and found guilty as to count two of said affidavit, and judgment was rendered on such finding that appellant make his fine to the State of Indiana in the sum of \$100 and costs, and be imprisoned in the Marion county jail for a term of thirty days, and from such judgment appellant appeals, and assigns as error: (1) The court erred in overruling appellant's motion to quash the second count of the affidavit. (2) The court erred in overruling appellant's motion for a new trial.

The affidavit was in five counts and the appellant moved, in the Marion Criminal Court, to quash each

count of said affidavit. The second count, omitting the caption, reads as follows: "And affiant aforesaid upon his oath aforesaid says that John Schulmeyer on October 14, 1918, at and in the city and county aforesaid, did then and there unlawfully keep intoxicating liquor to wit: whisky, gin, wine and beer, with intent then and there to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons, to the affiant unknown, within this state; contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana." The motion to quash said count states two reasons: (1) That count two does not state facts sufficient to constitute a public offense. (2) That count two does not state the offense with sufficient certainty.

Appellant contends that the second count of the affidavit fails to allege that the appellant kept intoxicating liquors for the purpose of sale within the state,

1. and that a charge in the second count of the affidavit that the defendant kept intoxicating liquors with intent then and there to sell the same to persons to the affiant unknown within the state cannot be construed as a charge that the defendant kept liquors for the purpose of sale to persons within the state.

The appellant is wrong in his construction of the language used. This count of the affidavit unequivocally states that the defendant, John Schulmeyer, in the city of Indianapolis, in Marion county, in the State of Indiana, did then and there unlawfully keep intoxicating liquor, to wit, whisky, gin, wine and beer, with intent then and there to sell, barter, exchange, give away, furnish and otherwise dispose of the same. The material allegations of this count of the affidavit are in the language of the statute and are sufficient. *Davis v. State* (1885), 100 Ind. 154; *State v. Stout* (1887), 112 Ind.



245, 13 N. E. 715; *Fahnestock v. State* (1885), 102 Ind. 156, 1 N. E. 372; *Regadanz v. State* (1908), 171 Ind. 387, 86 N. E. 449; *State v. Sarlin* (1919), *ante* 359, 123 N. E. 800.

As causes for a new trial appellant's motion alleges: First, the finding of the court is contrary to law; second, the finding of the court is not sustained by sufficient evidence. The appellant contends that the finding of the court is not sustained by sufficient evidence, because he claims that the police, when they arrested the defendant, did not find any whisky or intoxicating liquor in his possession, and that the evidence relating to the possession of such intoxicating liquor is wholly circumstantial and insufficient.

We have carefully examined the evidence with the view of determining its sufficiency to sustain the finding of the lower court, and, while the evidence in re-

2. gard to the possession of the intoxicating liquors by the appellant is circumstantial, the facts proved lead, without any doubt, to the conclusion that he did have possession of such intoxicating liquor, and that he kept it at the time and place charged in the second count of the affidavit, for the unlawful purposes charged, and that at such time and place he was making sales of such intoxicating liquors. The sufficiency of the evidence to sustain a finding on appeal depends solely upon the presence in the record of some competent evidence which tends to support the finding. *City of Bloomington v. Moore* (1915), 183 Ind. 283, 109 N. E. 42.

In the case of *Young v. Older* (1915), 183 Ind. 646, 109 N. E. 909, the court holds that a finding supported by some evidence is supported by sufficient evi-

3. dence. In determining whether the evidence is sufficient to sustain the verdict of the jury, or the finding of the court, this court will consider, not

only the positive testimony of the witnesses, but also such inferences as flow naturally from established facts. *Chicago, etc., R. Co. v. Lake Co. Savings, etc., Co.* (1917), 186 Ind. 358, 362, 114 N. E. 454; *Southern Product Co. v. Franklin Coil Hoop Co.* (1914), 183 Ind. 123, 124, 106 N. E. 872; *Union Nat. Bank v. Finley* (1913), 180 Ind. 470, 475, 103 N. E. 110; *Goodman v. State* (1919), *ante* 70, 121 N. E. 826.

The evidence is amply sufficient to sustain the finding of the Marion Criminal Court. No error appearing in the record, the judgment is affirmed.

NOTE.—Reported in 124 N. E. 490.

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## ROBINSON v. STATE OF INDIANA.

[No. 23,465. Filed October 14, 1919.]

1. **CRIMINAL LAW.—Circumstantial Evidence.—Sufficiency.**—To warrant a conviction in a criminal case on circumstantial evidence, the proof must not only coincide with the hypothesis of guilt but it must be inconsistent with any other rational conclusion. p. 469.
2. **CRIMINAL LAW.—Intoxicating Liquors.—Keeping Place.—Circumstantial Evidence.—Instruction.**—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689 in which there was no direct evidence that the defendant kept, ran or operated the place for the illegal sale of intoxicants, or that he had any interest therein or in the liquor sold, but there was evidence that at times he brought intoxicating liquor into a gambling room from an adjoining barroom and served it to the gamblers, and collected the money therefor, and that he operated the gambling game at times and frequently admitted persons to the room, the evidence also showing that other patrons of the gambling room performed the same acts at times, the Supreme Court cannot say that it was harmless error to refuse to instruct that, before the jury could convict on circumstantial evidence alone, the circumstances must be so convincing as to be inconsistent with any reasonable hypothesis of innocence, it being the defendant's contention that the facts could be reconciled on the theory that he performed such acts as a frequenter of the place and for the accommodation of others. pp. 470, 471.

From Delaware Circuit Court; *S. W. Haynes*, Special Judge.

Prosecution by the State of Indiana against William Robinson. From a judgment of conviction, the defendant appeals. *Reversed.*

*George W. Cromer* and *Harry Long*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

LAIRY, C. J.—Appellant was tried and convicted in the Delaware Circuit Court of the offense defined by §8351 Burns 1914, Acts 1907 p. 689, commonly known as the "Blind Tiger" Law. The indictment under which he was tried charged that he did unlawfully keep, run and operate a place where intoxicating liquors were then and there sold, bartered and given away in violation of law; and that he was found in the unlawful possession of intoxicating liquors kept for the purpose of being sold, bartered or given away in violation of law.

On appeal four errors are assigned as cause for reversal, the fourth being that the court erred in overruling appellant's motion for a new trial. The fourth error will be considered first.

In support of his motion for a new trial appellant asserts that the court erred in refusing to give instruction No. 12 tendered by him, and also that the verdict is not supported by sufficient evidence and is contrary to law. Other questions are presented by this motion which need not be set out or considered.

The place in which the intoxicating liquors were kept and sold, as shown by the evidence of the state, was located at 612½ South Walnut street in Muncie, Indiana. The state's evidence shows that there were five rooms on the second floor of the building, to which access was gained by means of a stairway. About half way up the stairway was a door, with a glass panel, which was

kept locked, but which was opened, in response to a bell, by an electric button pressed by a man standing at the head of the stairway. The state's evidence shows that defendant frequently admitted persons to the rooms; but the evidence also shows that others also answered the bell and gave admittance to persons. In the front room was a table where a game of poker was conducted, and the evidence shows that those engaged in the game drank whisky and beer, for which they paid. It is shown that the defendant on one occasion brought in drinks and collected the money, but it is also shown that other players had also on occasions brought in drinks and collected the money. The evidence shows that the defendant frequently took part in the poker game and also banked the game, selling the chips and collecting the money, but it is also shown that other players sometimes banked the game. In the middle room was a bar and back of this room were two other rooms, in one of which was located a craps table, and in the other a dice game known as "hieronymous." There is evidence that liquor was sold in the barroom, and that it was drunk in the other back rooms. There is evidence that the defendant operated the hieronymous game, and that other persons also operated it at times. The evidence shows without dispute that the rooms in question were rented, during the time to which the evidence is directed, from the owner by a man named Wicks, and that he was generally in and about the place. There is no evidence to show that defendant owned any of the liquor sold, or any of the gambling apparatus located in the rooms, or that he had any interest in the proceeds derived from the operation of the place.

It thus appears that there was no direct evidence to show that appellant kept, ran, or operated the place where the intoxicating liquors were sold. If that

1. fact, as found by the verdict, is sustained by the

evidence, it is because the conduct of the defendant, as shown by the evidence and the other circumstances proved in the case, was of such a nature as to reasonably justify the inference of the truth of that fact beyond a reasonable doubt. Speaking for the court on the subject of the force and effect of circumstantial evidence, Mitchel, J., said: "The true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is, not whether the proof establishes circumstances which are consistent, or which coincide with the hypothesis of the guilt of the accused, but whether the circumstances, satisfactorily established, are of so conclusive a character, and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis of guilt, or that they would account for, or concur with, or render probable the guilt of the accused, is not a reliable or admissible test, unless the circumstances rise to such a degree of cogency and force as, in the order of natural causes and effect, to exclude, to a moral certainty, every other hypothesis except the single one of guilt. *Binns v. State*, 66 Ind. 428; *Stout v. State*, 90 Ind. 1; Gillett, Crim. Law, section 873. The proof must not only coincide with the hypothesis of guilt, but it must be inconsistent with every other rational conclusion."

It is the theory of appellant that every fact shown by the evidence in relation to his acts, words and other conduct in and about the place, as well as every other

2. circumstance shown by the evidence, can be reconciled with his innocence on the hypothesis that he was a frequenter of the place who played poker, sometimes banking the game, as it is shown that other

frequenters of the place also did; and that all of the other acts done by him, as shown by the evidence, were done as an accommodation to his associates or to the proprietor, and not in the capacity of one engaged in keeping, running or operating the place. On this theory he requested the court to give instruction No. 12, reading as follows: "Before you can convict this defendant on circumstantial evidence alone, the circumstances must be so strong and convincing as to be inconsistent with any reasonable hypothesis of the defendant's innocence." This instruction states the law correctly as frequently announced by this court. *Want-*

*land v. State* (1895), 145 Ind. 38, 43 N. E. 931;

2. *Dunn v. State* (1906), 166 Ind. 694, 78 N. E.

198. As the court gave no other instruction embodying the proposition of law stated therein, the court erred in refusing to give the instruction so tendered. The court cannot say that the refusal to give such instruction was harmless. The defendant is not so clearly and certainly guilty as to justify such a holding. The fact necessary to his conviction that he was engaged in keeping, running and operating the place, at the times referred to in the evidence, does not appear from the facts and circumstances disclosed with such unerring certainty as to enable the court to say as a matter of law that they exclude all reasonable inferences to the contrary. While the circumstances shown may be said to all coincide with the hypothesis of guilt, it cannot be said that they are inconsistent with any other rational conclusion.

The judgment is reversed, with instructions to grant appellant's motion for a new trial.

NOTE.—Reported in 124 N. E. 489. Circumstantial evidence: necessity of instruction, 69 L. R. A. 193, 12 L. R. A. (N. S.) 220, 97 Am. St. 789, 16 C. J. 1010. See under (1) Ann. Cas. 1913E 428, 16 C. J. 763.

## CLIFT v. SOUTHERN RAILWAY COMPANY.

[No. 23,170. Filed October 17, 1919.]

1. **CARRIERS.—*Rejection or Allowance of Freight Claims.—Statute.—Validity.***—The act of 1911 (Acts 1911 p. 454, §§3920b-3920h Burns 1914), providing for an action in damages, where the carrier neither pays nor rejects within ninety days a claim for freight lost or damaged, so far at least as the initial carrier is concerned, is not in conflict with the federal or the state Constitution. p. 473.
2. **CARRIERS.—*Failure to Allow or Reject Claim for Damages.—Action.—Complaint.***—In an action, under Acts 1911 p. 454, §§3320b-3320h Burns 1914, for failure of the carrier to pay or to reject within ninety days a claim for damages to a shipment of watermelons belonging to the plaintiff, a complaint showing that the carrier received the shipment in good condition from the plaintiff's agents to be delivered to the consignee upon presentation of a bill of lading, that the carrier, without surrendering the bill of lading, wrongfully allowed the consignee to remove a part of the melons and failed to notify the plaintiff of the consignee's refusal to accept the rest until after they had spoiled, and that the claim was filed within four months, was sufficient to bring the plaintiff within the provisions of the statute and to show that the claim was not fictitious. pp. 474, 476.
3. **CARRIERS.—*Damages to Freight.—Failure to Allow or Reject Claim.—Complaint.***—In an action against a carrier, under Acts 1911 p. 454, §§3920b-3920h Burns 1914, for failure to pay or reject, in whole or in part, a claim for damages within the time provided in the statute, it is not essential to allege the failure of the carrier to take steps for the preservation of the goods shipped or to give notice, etc., as required in a common-law action for damages to shipments. p. 476.

From Gibson Circuit Court; *Simon S. Vandever*. Judge.

Action by Joseph H. Clift against the Southern Railway Company. From a judgment for the defendant, the plaintiff appeals. (Transferred from the Appellate Court under §1397 Burns 1914, Acts 1901 p. 568). *Reversed*.

*T. Morton McDonald*, for appellant.

*A. P. Humphrey, Edward P. Humphrey, John D. Welman, Lucius C. Embree and Morton C. Embree*, for appellee.

HARVEY, J.—This is an action to recover of appellee the amount of a claim for lost and damaged freight, which claim is alleged to have been admitted by appellee to be owing appellant because the claim was neither “paid or rejected by such carrier within ninety days” of its presentation.

This cause of action is based upon the provisions of the act of March 4, 1911 (Acts 1911 p. 454, §§3920b-3920h Burns 1914), and is not an action to enforce any common-law remedy against the railroad company for damage to or failure to deliver freight.

The rights and remedies of the parties depend, in this action, upon the validity of said act, the facts relating to the filing of said claim, and the conduct of appellee in reference to the claim filed.

The third paragraph, and the only paragraph, of complaint then before the court was held insufficient upon demurrer for want of facts, and judgment was rendered upon plaintiff's failure to plead further. The only question here is as to whether the court's ruling upon demurrer was erroneous.

The act is, so far at least as the initial carrier is concerned, not in contravention of the Constitution of the United States. For reasons see *Seaboard Air*

1. *Line v. Seegers* (1907), 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 110; *Kansas City, etc., R. Co. v. Anderson* (1914), 233 U. S. 325, 34 Sup. Ct. 599, 58 L. Ed. 983. For the same reasons it is not in contravention of the Constitution of the State of Indiana.

The claim so filed states that Griffen and Tichenor, as agents for appellant, delivered to appellee 923 water-



melons of the value of sixty-two dollars, for transportation to Marion, Indiana, there to be delivered to Carr and Company, upon presentation of the bill of lading; that said melons were at the time of delivery to appellee in good and merchantable condition; that at Marion the carrier wrongfully, in violation of the terms of the bill of lading, allowed Carr and Company to enter the car and inspect the melons and remove a portion thereof without a surrender of the bill of lading; that appellee failed to notify appellant of the refusal of Carr and Company to accept said melons, and failed to take any steps to dispose of said melons, or to protect the interests of appellant; that said melons were so held at Marion until the same became spoiled and wholly useless to claimants. To this claim was attached the original bill of lading, which shows that the property was received at Princeton, Indiana, "from Griffen & Tichenor," and "consigned to the order of Griffen & Tichenor, destination, Marion, Indiana, notify Carr & Company," and said bill was signed "Griffen & Tichenor, shippers."

The complaint alleges that within four months from the date of said shipment, and after the arrival of said shipment at the city of Marion, plaintiff presented to the agent of the defendant, who issued the bill of lading, at said city of Princeton, his claim in writing for loss of and damage to said melons, which claim was itemized and verified by one Moses C. Griffen, as agent for the plaintiff, and that to said claim was attached the original paid freight bill received on account of said shipment, and that the defendant, appellee, did not at any time within ninety days from the time said claim was so presented, nor did anyone in its behalf, either pay or reject said claim, in whole or in part.

Appellee claims that said complaint fails to allege a

number of things which appellee believes to be material, the absence of which renders said complaint insufficient,—for instance, that there is no allegation that the “order bill of lading” was indorsed, nor does there appear upon the copy of the bill of lading attached to the alleged claim any writing purporting to be an indorsement thereof; that there is no allegation that Carr and Company ever had the bill of lading in their possession; that there is no allegation of fact whereby it appears that the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company could have delivered the melons to Carr and Company without breaching the contract as same is evidenced by the bill of lading; that the claim itself set out in the complaint shows upon its face that appellant did not present a claim to the agent of appellee, but that the same was presented by other parties; that the bill of lading was not issued to appellant, but to the order of Griffen and Tichenor; that there is no allegation that appellee, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company ever had any knowledge or notice that appellant was the owner of any part of the melons, or had any interest in them; that there is no allegation that Griffen and Tichenor were not notified by the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company of the alleged refusal of Carr and Company to accept the melons; that there is no allegation that appellant did not have knowledge of the refusal of Carr and Company, nor that his alleged agent did not have such knowledge within a reasonable time after such refusal; and that the facts pleaded disclose that appellant was not the lawful holder of said bill of lading.

From the complaint it sufficiently appears that the claim was properly filed for and on behalf of appellant by appellant’s agents, and that, if appellee was liable to anyone, it was liable to appellant, rather than Griffen

and Tichenor, and that the appellant was the lawful holder of the bill of lading, although the same may have been in the possession of Griffen and Tichenor, his agents. The claim filed discloses appellant's interest, and if appellee had doubt on this question, it could easily have protected itself by rejecting the claim.

Allegations as to the conduct of the railroad companies, or their failure to act in reference to the preservation of the melons, notice, etc., would be essential

3. to a good complaint in a common-law action for damages; but they are not essential to a complaint which seeks to recover because the defendant did not within the time limited pay or reject said claim, in whole or in part.

The complaint shows that appellant is one of the class of persons entitled to recover under this statute. It is disclosed by the complaint, and admitted by de-

2. murrer, that the plaintiff was the owner of the melons for which he filed the claim; and it is admitted that said melons were shipped by appellant through his agents. It is admitted that the same did not come to the hands of the persons to whom they were to be delivered. Enough is disclosed to show that the claim was not fictitious and that it was filed by one who had the dealings with appellee, and who, under the statute, was entitled to have his claim acted upon within ninety days, and to be informed within said time of the appellee's action upon the claim.

No question is here presented as to whether appellant, if he desired to pursue his claim after the railroad company had failed to act upon the same, should have taken the same up with the Railroad Commission, or its successor, the Public Service Commission.

The paragraph was sufficient, and the demurrer should have been overruled. Judgment reversed with directions for further proceedings in accord herewith.

NOTE.—Reported in 124 N. E. 457. Carriers: validity of statute imposing penalty for failure to pay a claim within a specified time, 20 Ann. Cas. 1056, Ann. Cas. 1915D 824, 1916D 335. See under (2) 10 C. J. 347.

### O'DANIEL v. STATE OF INDIANA.

[No. 23,507. Filed May 15, 1919. Rehearing denied October 17, 1919.]

1. ARSON.—*Character of Property.—Proof.*—Under an indictment for arson which alleges the burning of a building of another, the state should prove a burning of that which was a part of the structure belonging to the real estate, and not the defendant's personal property in the building, which he had a right to remove. p. 479.
2. ARSON.—*Proof.—Sufficiency of Agreement as to Ownership of Building.—Inference.*—In a prosecution for burning the building of another, under §2260 Burns 1914, Acts 1905 p. 584, §371, a judgment of conviction must be reversed, where the only evidence as to the ownership and the value of the building was an agreement by the parties in reference thereto which failed to fix any date of ownership, as the court on appeal will not infer the date to be that alleged in the indictment; the state, in asking for an admission from a defendant in a criminal case, should make its request as certain and accurate as the proof is required to be. pp. 479, 483.
3. ARSON.—*Evidence.—Motive.—Insurance.*—In a prosecution for burning the building of another, evidence concerning insurance which the defendant had on his personal property in the building was competent to show motive, though the statute defining arson makes it a crime to burn one's own property to defraud an insurance company, a different crime than that charged. p. 480.
4. ARSON.—*Value of Structure.—Statute.—Construction.*—In the statute defining arson, §2260 Burns 1914, Acts 1905 p. 584, §371, the provision fixing the value of the property burned at "twenty dollars or upwards" has reference to the value of the thing burned and not to the damage caused by the burning. p. 481.
5. INDICTMENT AND INFORMATION.—*Arson.—Value of Structure.—Surplusage.—Fine.*—In a prosecution for arson, under §2260 Burns 1914, Acts 1905 p. 584, §371, the fine may be double the value of the structure burned, subject to Art. 1, §16, of the

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O'Daniel v. State—188 Ind. 477.

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state Constitution, prohibiting excessive fines; hence, an allegation in an indictment fixing the damage to the structure burned at \$500 is surplusage, it being sufficient to show that some burning was done. p. 481.

From Marion Criminal Court (46,711) ; *James A. Collins*, Judge.

Prosecution by the State of Indiana against John F. O'Daniel. From a judgment of conviction, the defendant appeals. *Reversed*.

*Thomas D. McGee*, for appellant.

*Ele Stansbury*, Attorney-General, *Newman T. Miller* and *Dale F. Stansbury*, for the state.

TOWNSEND, J.—Appellant was indicted for arson. §2260 Burns 1914, Acts 1905 p. 584, §371. He was tried by the court and found guilty, fined \$1,000, and sentenced.

The substance of the indictment necessary to be considered in this opinion is that appellant on December 10, 1916, did set fire to and burn a certain building used for residence, manufacturing and commerce, known as 122 E. Ohio Street, in the city of Indianapolis; that the building was of the value of \$50,000, and was the property of Samuel E. Rauh; that the damage done to the building by the burning was \$500.

The questions arise on motion for a new trial: (1) Error in permitting evidence of insurance and proof of loss concerning certain personal property which appellant had in the building. (2) That the evidence does not show in dollars and cents what damage was done to the building, and therefore did not authorize a fine of \$1,000. (3) That the ownership and value of the building, on December 10, 1916, is not shown by the evidence.

The evidence shows that in certain rooms of this building appellant had an engraving establishment; that

on December 10, 1916, a fire occurred, which destroyed the personal property belonging to appellant. It is not clear from the evidence that there was any burning of the building; but if this were the only question presented as to the sufficiency of the evidence, it would be difficult to hold that there was not some evidence from which the court could infer that there was some burning of a part of the building in question. The state should show clearly, under the indictment here, that there was a burning of the building: a burning of that which was a part of the structure that belonged to the real estate, and not appellant's personal property or his trade fixtures in the building, which he had a right to remove.

But appellant presents a further question that is very clear from the record. At the outset of the evidence there was a stipulation as follows:

"It is hereby stipulated and agreed by the parties herein that a certain building situated in Marion county and used for the purpose of residence, manufacturer and commerce, commonly known as 122 E. Ohio street in the city of Indianapolis, Marion county, Indiana, was of the value of Fifty Thousand Dollars and was the property of one Samuel E. Rauh."

This is the only evidence of the ownership and value of the building. It will be observed that this stipulation does not fix any time of ownership. For

2. aught that appears from the evidence, appellant himself may have been the owner of the building on December 10, 1916. He is charged here with burning the building of another. Therefore the lack of evidence as to the ownership and value of the building at the time in question is fatal, and for this reason the judgment must be reversed.

Another question presented by appellant is that the court erred in permitting evidence concerning insurance which appellant had on his personal prop-

erty in his engraving business, because appellant says that the arson statute provides that it shall be a crime to burn one's own property to defraud an insurance company, and, that not being the charge here, this evidence proved a different and distinct crime. This evidence was competent to show motive.

Appellant's other contention is that, there being no evidence of the damage to the building, the court was not authorized to inflict a fine of \$1,000. Appellant bases his contention upon decisions of this court. The first one being the case of *Ritchey v. State* (1844), 7 Blackf. 168; the second being *Kenningham v. State* (1889), 120 Ind. 322, 22 N. E. 313. The case in the 7th Blackford, *supra*, was decided under §25, chapter 53, R. S. 1843, and the penalty then was imprisonment and fine "not exceeding double the value of the property *destroyed*." The 120th Indiana, *supra*, turned on the proposition of an attempt to burn, and was under the acts of 1881 (§1927 R. S. 1881). The proposition was that the statute as then worded did not provide for an attempt to burn. At the next session of the legislature after that decision, the act was amended (Acts 1891 p. 402). This act, with a few enlargements and changing of the wording as to the things burned or attempted to be burned, is our present act. §2260 Burns 1914, *supra*. The act now is: "Whoever wilfully and maliciously burns or attempts to burn any dwelling house \* \* \* the property so burned or attempted to be burned, being of the value of twenty dollars or upwards, and being the property of another, or being insured against loss or damage by fire, and the burning or attempt to burn being with intent to prejudice or defraud the insurer, is guilty of arson, and, on

conviction, shall be imprisoned in the state prison not less than two years nor more than twenty-one years, and fined not exceeding double the value of the property burned or attempted to be burned; and should the life of any person be lost thereby, such offender shall be deemed guilty of murder in the first degree, and shall suffer death or be imprisoned in the state prison during life."

We understand appellant's point to be that, unless there is destruction of the building to the extent of \$20 worth, the crime of burning is not made out. We

4. hold that the crime of burning is made out if any part of the building is burned, and that it is only necessary that the value of the thing be in excess of \$20, not the damage by the burning. We also hold that it is necessary to show some burning of the structure. A burning, however slight, would be sufficient. The amount in dollars and cents of the damage done is immaterial.

As the law now stands, the fine may be double the value of the structure, subject always, however, to §16 of the Bill of Rights (Art. 1, §16, Constitution

5. of Indiana), against excessive fines. Therefore, the allegation in the pleading that \$500 worth of damage was done is surplusage under the present statute. It would be sufficient to show that some burning was done. As we said before, it is difficult to tell from the evidence that there was any burning of anything other than appellant's personal property and trade fixtures. But, however this may be, there is a total failure of proof of the ownership and value of the building at the time of the fire.

The finding is therefore not sustained by sufficient evidence, and the judgment is reversed, with instructions to grant a new trial.



## ON PETITION FOR REHEARING.

TOWNSEND, J.—Counsel for the state failed in their original brief to argue or cite authority to the proposition on which the case was reversed. They now claim that their failure to argue or cite authorities on this point was because appellant's original brief did not strongly urge this point; that they were therefore surprised at the decision of the court. We might invoke the rules of the court, but state's counsel present a contention that we think should be settled.

The state says that the admission as to ownership and value of the property should be interpreted to mean on the date charged in the indictment. Numerous civil cases are cited, and one criminal case (*People v. Nolan* [1917], 33 Cal. App. 493, 165 Pac. 715), to sustain this contention.

The California case is based on rules laid down as to stipulations and agreements in civil cases. It contents itself with citing the text of encyclopedias of law. That text, when examined, is sustained by decisions in civil cases only. This California case is squarely in point. The defendant in that case was charged with selling alcoholic liquor in no-license territory. During the trial of the case, the state's attorney proposed to the defendant's attorney that the territory charged in the indictment be admitted to be no-license territory. Defendant's attorney said, "Yes." On appeal the point was raised that this admission did not fix the date charged in the indictment, and the court said: "We must assume that the district attorney knew that it was necessary to establish the truth of the material averments of the indictment, and that one of such averments was the existence of the no-license ordinance at the time of the alleged offense."

We are not impressed with this authority. We think

it a dangerous rule to undertake to infer what is meant in stipulations and agreements of this kind, or

2. what the thought of either the state or the defendant's attorney was with reference to them.

It is the business of this court to fix rules of law that are definite, as near as may be, and in a criminal case the rule should be that, when the state asks for an admission from the defendant, its request should be as certain and accurate as the proof is required to be. If, in the instant case, we are to construe this stipulation and admission to mean the date charged in the indictment, then suppose that we had this: "It is agreed that Samuel E. Rauh was the owner of the building and it was of the value of \$50,000." Then we should be asked to infer that this means both the date alleged in the indictment and the description of the building. Then suppose the admission is as follows: "It is admitted and agreed by the parties that the building was the property of another and was of the value of \$50,000." Then we should be asked to infer the date, the name of the owner and the description of the building, and this would all be done on the same reasoning and by force of the same authorities that the state is now invoking. If we should do this, we would soon find ourselves adrift without compass or rudder—nothing but sail. It is of less consequence that the guilty should escape, or that the state have the expense and trouble of retrial, than that a rule should be laid down, the limits of which would become hazy and indefinite. When the people of the State of Indiana ask for an admission from a defendant in a criminal case, it seems to us that it is better to require them to know and state accurately what it is that they want the defendant to admit.

Had the state, in the instant case, placed Samuel E. Rauh on the witness stand and proven by him that he was the owner of the building at 122 E. Ohio street and

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Lockett v. Hammond—188 Ind. 484.

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that it was of the value of \$50,000, and stopped at that, we think no one would seriously contend that this proof would be sufficient. We think the same rule should apply to the stipulation.

Petition for rehearing denied.

NOTE.—Reported in 123 N. E. 241. Arson: ownership of property as affecting crime, 1 Ann. Cas. 621, Ann. Cas. 1912A 1126; commission of, with intent to defraud insurer of property, Ann. Cas. 1913C 1164, 32 L. R. A. 648. See under (1) 5 C. J. 547, 550; (2) 5 C. J. 569; (3) 5 C. J. 574; (4, 5) 5 C. J. 552.

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LUCKETT v. HAMMOND ET AL.

[No. 22,959. Filed October 17, 1919.]

1. JUDGMENT.—*Basis.—Determination From Pleadings.—Execution.*—Where, in a suit to set aside an execution sale, one paragraph of complaint asked that the judgment be set aside for fraud and the other proceeded on the theory that the property was exempt from execution, a judgment that the sale and the sheriff's certificate and deed be set aside, without cancellation of the judgment on which the execution issued, indicates that the relief was granted under the latter paragraph. p. 487.
2. APPEAL.—*Overruling Demurrer.—Harmless Error.*—Error in overruling a demurrer to a paragraph of complaint was harmless, where the plaintiff recovered judgment under another paragraph. p. 487.
3. EXECUTION.—*Setting Aside Sale.—Sufficiency of Pleading.*—A complaint of an execution debtor and another to set aside an execution sale of lots, alleging in substance that, after recovery of the judgment on which the execution was issued, the execution debtor sold the lots, which after mesne conveyances came into the hands of the other plaintiff, that the execution debtor, at the time he sold the lots and at the time of the issuance of execution, levy and sale thereon, was not the owner of property in excess of \$600, and that his failure to claim exemption was due to the fact that he was living in another county and the execution was issued and the lots sold thereon without notice to him and without his knowledge or consent, was sufficient as against a demurrer for want of facts, though carelessly drawn and subject to a motion to make more specific. p. 488.

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Luckett v. Hammond—188 Ind. 484.

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4. **EXEMPTIONS.—*Claiming After Sale on Execution.***—An execution debtor may, after he has sold property subject to lien of an execution, include it in his schedule and claim it as exempt. p. 489.
5. **EXEMPTIONS.—*Claim of, by Purchaser from Execution Debtor.***—The purchaser of real estate from an execution debtor, if such debtor was not the owner of property of value in excess of \$600 at the time of the purchase, may claim the property as exempt or maintain an action before the execution sale either to quiet title as against the execution lien or to enjoin such sale. p. 489.
6. **PLEADING.—*Acts Performed After Filing.—Supplemental Complaint.—Amendment.***—In an action to enjoin an execution sale, though allegations showing the sheriff's sale and the execution of a sheriff's deed to have occurred after the filing of the complaint were proper subjects for a supplemental complaint, under §408 Burns 1914, §399 R. S. 1881, the pleading thereof by way of amendment, though not an approved method, was more a defect of form than of substance, since the result sought—the freeing of the property from the cloud cast upon it by the levied execution and later by the sale and deed—was not materially different. p. 489.
7. **EXECUTION.—*Exemption.—Delay in Claiming.—Excuse.***—The delay of a judgment debtor to object to a sale on execution on the judgment until more than two months after the sale, urged as *laches* barring his suit to set the sale aside, was justified under allegations of the complaint showing that such debtor was at the time a resident of another county and had no notice or knowledge of the execution, levy and sale. p. 490.
8. **EXECUTION.—*Suit by Purchaser of Judgment Debtor to Set Aside Sale.—Parties.***—In a suit by the purchaser of land to enjoin an execution sale thereof to satisfy a judgment against the vendor, the vendor is not a necessary but a proper party, both being interested in the same general relief. p. 490.
9. **EXECUTION.—*Setting Aside Sale.—Intervention by Judgment Debtor in Suit by Purchaser.***—In a suit by the purchaser of land to enjoin an execution sale thereof on a judgment against the vendor, on the ground that the property was exempt when it was sold by the latter, equity permits the vendor to intervene, after the sale on execution, and to ask relief on the same ground, where there is a sufficient showing of his lack of notice or knowledge of the execution, levy and sale, and the issue presented is germane to the original proceedings. p. 490.
10. **LIS PENDENS.—*Notice.—Purchaser at Execution Sale.***—A purchaser at an execution sale takes with notice of all rights

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Lockett v. Hammond—188 Ind. 484.

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that may legally grow out of a pending suit to enjoin such sale on the ground that the property is exempt. p. 491.

11. PLEADING.—*Suit to Enjoin Execution Sale.—Amendment.—New Cause.*—In a suit to enjoin an execution sale, on the ground that the property was exempt, a paragraph of amended complaint filed after the execution sale, and seeking relief from such sale on the same ground, was not objectionable as being a new and different cause of action, the facts pleaded being in harmony with the original cause and the character of the demand remaining the same. p. 491.

From Crawford Circuit Court; *William Ridley*, Judge.

Suit by Felix G. Hammond, in which John V. McCoy afterwards intervened as a party plaintiff, against William M. Lockett and another. From a judgment for the plaintiffs, the named defendant appeals. (Transferred from the Appellate Court under Acts 1901 p. 590, §1405 Burns 1914.) *Affirmed.*

*John H. Lockett, Zenor & McIntyre, and Pickens, Moores, Davidson & Pickens*, for appellant.

*Stotsenburg & Weathers*, for appellees.

MYERS, J.—This was a suit brought by appellee Hammond on January 13, 1911, in the Crawford Circuit Court against appellant Lockett, and one Funk, then sheriff of Crawford county, to enjoin the latter from selling certain pieces of real estate in that county on the ground that they were not subject to levy and sale on execution. Steps additional necessary to secure the issuing of a restraining order were not taken, and on January 14, 1911, the sale was had and the property sold to Lockett, who was the judgment creditor. Thereafter from time to time various amended and additional paragraphs of complaint were filed by both Hammond and McCoy, the latter having been admitted as a party plaintiff on March 25, 1911. This cause was tried on the issues formed by appellant's answer in two paragraphs to an amended and supplemental first paragraph

of complaint, filed March 11, 1912, and an amended additional sixth paragraph, filed October 21, 1912. The trial resulted in a judgment in favor of appellees. For a reversal of that judgment appellant has assigned errors on the rulings of the trial court in overruling his demurrer to each of said paragraphs of complaint, and in overruling his motion for a new trial.

Appellant in the trial court challenged by demurrer for want of facts to state a cause of action each paragraph of the complaint on which the cause was

1. tried. The record before us in this case affirmatively shows that the judgment rests upon the amended additional sixth paragraph. We reach
2. this conclusion under the belief that the relief sought under the first paragraph was that the judgment be set aside for fraud in its procurement, while the sixth proceeds under the theory that the lots were exempt from execution sale by reason of the fact that at the time of the sale of the lots by McCoy and at the time of the issuance and levy of the execution and sale thereon the debtor's property did not exceed in value \$600. The finding and judgment was that the sale of the lots by the sheriff be set aside and the sheriff's certificate of sale and deed made and issued thereunder by the sheriff to appellant be canceled and set aside, all of which is in conformity with the alleged facts and prayer of the sixth paragraph. It will be observed from the substance of the judgment here given that the judgment upon which the execution issued was not canceled or set aside, which under the first paragraph would be the basis for setting aside the sale. If we are correct in our conclusion, the overruling of the demurrer to the first paragraph, though erroneous, was a harmless error, and we will give no attention to the objections urged against that paragraph. *Lime City Bldg., etc., Assn. v. Black* (1894), 136 Ind. 544, 35 N.

E. 829; *Ervin v. State, ex rel.* (1897), 150 Ind. 332, 48 N. E. 249; *Bess v. Morgan* (1913), 55 Ind. App. 430, 103 N. E. 1086; *Laramore v. Blumenthal* (1914), 58 Ind. App. 597, 606, 108 N. E. 602; *Tracewell, Admr., v. Farnsley* (1886), 104 Ind. 497, 4 N. E. 162.

The record shows that this suit was commenced on January 13, 1911, by appellee Hammond. But in the paragraph in question Hammond and McCoy ap-

3. pear as parties plaintiff and allege in substance that on October 18, 1901, the appellant recovered a judgment against McCoy and others on a promissory note in the sum of \$2,000, and on that date McCoy was the owner of lots Nos. 51 and 52 in the town of English, which he afterwards sold and conveyed to one Thomas, and by various mesne conveyances these lots became the property of Hammond, who is now the legal owner of the same; that in December, 1910, appellant caused an execution to issue on the judgment, and the same to be delivered to the sheriff of the county who levied the same upon the lots which were sold; that McCoy was not on the day the lots were sold to Thomas, nor has he been at any time since, the owner of property in value to exceed \$600; that by way of excuse on the part of McCoy for his failure to claim the lots as exempt prior to the sale, he shows that at the time of the issuance and continuously thereafter, including the day of sale, he was and now is a resident householder, residing and was present at his home in Orange county, Indiana; that at no time, or in any manner, was any notice of the issuing of the execution served upon him, nor was any demand made upon him for property; that no opportunity was given him by the sheriff to surrender any property or to claim his exemption as a resident householder, which he desired to do and would have done had he been given such opportunity; that prior to any notice, knowledge or consent on his part the execution was issued, levy made

and lots sold. This paragraph is carelessly prepared, and is subject to a motion to make more specific, yet we have concluded to hold it sufficient to admit evidence tending to prove that at the time of the sale of the lots to Thomas, as well as at the time of the issuing of the execution, levy and sale of the lots, the execution debtor's property real and personal did not exceed in value \$600. In the present case the property involved is the lots sold to Thomas and, as said in *Barnard v. Brown* (1887), 112 Ind. 53, 58, 13 N. E. 401, 403: "The material inquiry, therefore, as to the value of Brown's (here McCoy's) property had relation to the time of the conveyance, and not to the time of the commencement of this suit."

It is well settled that an execution debtor may, after he has sold property which was subject to a lien of an execution, include it in his schedule and claim it

4. as exempt. So, also, upon well-recognized equitable principles may the purchaser of real estate claim it as exempt from execution sale, if his
5. vendor could have done so. And, if need be, such purchaser may maintain a suit commenced before the execution sale to quiet his title to such real estate as against such lien or to enjoin the sale on the ground that, at the time of his purchase, his vendor was not the owner of property in value to exceed \$600. *Moss v. Jenkins* (1896), 146 Ind. 589, 598, 45 N. E. 789; *Godman v. Smith* (1861), 17 Ind. 152; *Vandibur v. Love* (1857), 10 Ind. 54; *Kirk v. Macy* (1912), 53 Ind. App. 17, 21, 101 N. E. 108; *Rich v. C. Callahan Co.* (1912), 179 Ind. 509, 101 N. E. 810.

In the instant case we know, from the third paragraph of the original complaint, that Hammond commenced this suit prior to the execution sale, al-

6. leging therein that McCoy, his remote grantor, had property not to exceed \$600 on the day he



sold the lots to his grantee Thomas. Also, that on the day the judgment was rendered, and continuously thereafter, said lots were, and are at this time, exempt from execution sale, under the exemption laws of the State of Indiana, and prayed that the defendant Luckett and the sheriff be enjoined from selling the lots. The substance of the third paragraph is found in the paragraph in question with the additional facts which occurred after the sale. The sheriff's sale and the execution of a sheriff's deed to appellant each occurred after the filing of the original complaint, and were matters clearly proper for a supplemental bill (*Patten v. Stewart* [1865], 24 Ind. 332; §408 Burns 1914, §399 R. S. 1881), but they were included as a part of the so-called amended pleading. This form of pleading has not been approved, but as applied to this case we regard the criticism more in the nature of a defect in form than a defect in substance. *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337, 349, 64 N. E. 680. These additional facts to an otherwise sufficient complaint are effective to change the extent of the relief asked, but the general result—freeing the property by judicial action from the cloud cast upon it by the levied execution and later by the sale and deed—is not materially different. At least, the additional facts are in harmony with the cause of action made by the original complaint. *Richwine v. Presbyterian Church, etc.* (1893), 135 Ind. 80, 34 N. E. 737.

True, the paragraph in question was not filed until October 21, 1912, but it purports to be an amendment of one previously filed. The transcript of the order-

book entries warrant the conclusion that McCoy's

7. objection to the sale and his insistence that it be set aside dates from March 25, 1911, or two
8. months and eleven days after the sale. On this

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Lockett v. Hammond—188 Ind. 484.

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fact appellant bases his claim of such *laches* on

9. the part of McCoy as will preclude him from maintaining a suit to set the sale aside. The

10. question thus suggested involves the elements of reasonable time and reasonable diligence, which are fully covered by the allegations of fact under consideration, and this being true, McCoy has presented an excuse justifying his delay in not more timely objecting to the sale and as a resident householder claiming the property in question as exempt from sale under our exemption laws. As we have seen, Hammond was at that time individually prosecuting a suit in opposition to the execution sale as he was authorized to do under the holdings of this court in the cases last cited. McCoy, therefore, was not a necessary but a proper party. Both were interested in the same general relief; McCoy to protect his warranty, and Hammond to protect his lots from execution sale. This suit is governed by equity procedure which is sufficiently elastic to admit McCoy as a party when, as here, a sufficient excuse is shown, and the issue presented by him is within and germane to the original proceedings then in motion in opposition to the execution sale. Of this right, as well as all other rights that might legally grow out of the pending litigation, the *pendente lite* purchaser must take notice. *Fee v. Moore* (1881), 74 Ind. 319, 324; *Buser v. Shepard* (1886), 107 Ind. 417, 424, 8 N. E. 280; *Rothschild v. Leonhard* (1904), 33 Ind. App. 452, 459, 71 N. E. 673; *Schaffner v. Voss* (1910), 46 Ind. App. 551, 556, 93 N. E. 235; *Holden v. City of Alton* (1899), 179 Ill. 318, 53 N. E. 556.

Appellant also insists that this paragraph counts upon a new and different cause of action from that stated in either paragraph of the original complaint. From

11. what we have said, it is evident that in our view his position is untenable. For the cause of ac-

tion and the character of the demand throughout have remained the same. *Cleveland, etc., R. Co. v. Bergschicker* (1903), 162 Ind. 108, 110, 69 N. E. 1000.

Appellant has assigned many specifications in support of his motion for a new trial, but upon the theory that the decision of the court and judgment rests on the sixth paragraph it will serve no good purpose to give attention to the reasons offered which have reference to the first paragraph. By eliminating the immaterial specifications we still have before us the contention of insufficient evidence.

We have taken the time to examine the evidence as it appears in the record, and, while it is not as convincing in appellees' behalf as they would have us believe, yet, when it is considered with a view of no evidence to support the material allegations of the sixth paragraph, a question is presented which we cannot affirm. When the evidence is considered as to the value of McCoy's property on the day he sold the lots to Thomas and thereafter down to the day of trial in connection with the rights of his wife in his property as affected by a sale on execution (*Isgrigg v. Pauley* [1897], 148 Ind. 436, 439, 47 N. E. 821; *Currier v. Elliott* [1895], 141 Ind. 394, 405, 39 N. E. 554), we are not prepared to say that there is no evidence to support the decision of the court.

We have no reason to believe the trial was unfair, and the judgment is affirmed.

NOTE.—Reported in 124 N. E. 675. Execution: purchaser at sale as purchaser *pendente lite*, Ann. Cas. 1918C 66; injunction against sale, Ann. Cas. 1918C 152. See under (3) 17 Cyc 1284; (4) 18 Cyc 1474; (7, 9) 17 Cyc 1283.

## BARKER v. STATE OF INDIANA.

[No. 23,564. Filed October 28, 1919.]

1. CRIMINAL LAW.—*Instructions.—Bill of Exceptions.*—The instructions in a criminal case can be made a part of the record only by a bill of exceptions, and there must be an affirmative showing that the bill of exceptions was filed with the clerk as required by §2163 Burns 1914, Acts 1905 p. 584, §287, after it had been signed, which matters cannot be shown by recitals in the bill or by the file mark of the clerk. p. 494.
2. CRIMINAL LAW.—*Appeal.—Reasonable Doubt.—Sufficiency of Evidence.*—It is not necessary on appeal from a conviction that the evidence should show the defendant's guilt beyond a reasonable doubt in order to sustain the verdict; all that is required is that there shall be some evidence sustaining every material allegation of at least one count of the affidavit. p. 495.
3. CRIMINAL LAW.—*Appeal.—Evidence.—Weight.*—In determining whether the verdict is sustained by sufficient evidence a court of appeal will not weigh conflicting evidence, but will consider only the evidence tending to support the judgment. p. 495.
4. INTOXICATING LIQUORS.—*Keeping Place.—Appeal.—Sufficiency of Evidence.*—On appeal from a judgment of conviction for the violation of the Prohibition Act, Acts 1917 p. 15, the evidence is reviewed and held sufficient to sustain the verdict, under the rule that the judgment will be upheld unless there is a total lack of evidence on an essential element of the offense. p. 496.

From Vigo Circuit Court; *Arthur Z. Thomas*, Special Judge.

Prosecution by the State of Indiana against Jesse Barker. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Sweet & Littlefield* and *P. O. Colliver*, for appellant.

*Ele Stansbury*, Attorney-General, and *Edward M. White*, for the state.

WILLOUGHBY, J.—The appellant was convicted in the Vigo Circuit Court in a prosecution under §4 and §20 of chapter 4 of the acts of 1917, known as the Prohibi-

tion Act. The affidavit was in two counts. The first count charges that at the time and place named in the affidavit the defendant "did then and there unlawfully maintain and assist in maintaining a room, place and building where intoxicating liquors were then and there sold, bartered and given away." The second count charges that at the time and place named in the affidavit the defendant "did then and there unlawfully keep intoxicating liquors with intent to sell, barter, exchange and give the same away in violation of the laws of the State of Indiana." No motion was made to quash either count of the affidavit. The defendant pleaded not guilty, and a trial by jury resulted in a verdict of guilty. Judgment being rendered on the verdict, the defendant appeals and assigns as error that the court erred in overruling appellant's motion for a new trial. The motion for a new trial names nine reasons, the first seven of which are based on alleged errors in giving or refusing instructions. The others are that the verdict is not sustained by sufficient evidence, and is contrary to law.

The instructions given and those tendered and refused are attempted to be brought into the record by a bill of exceptions, but an examination of the

1. record fails to show that the bill of exceptions was filed with the clerk as required by statute. §2163 Burns 1914, Acts 1905 p. 584, §287. The instructions in a criminal case can only be brought into the record by a bill of exceptions; it must affirmatively appear from the record that the bill of exceptions was filed with the clerk, and the filing cannot be shown by mere recitals in the bill or by the file mark of the clerk thereon, and the filing of the bill must be done after it has been signed. *Stewart v. State* (1888), 113 Ind. 505, 16 N. E. 186; *Drake v. State* (1896), 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; *Harris v. State* (1900), 155 Ind. 15, 56 N. E. 916; *Merrill v. State* (1900), 156 Ind. 99,

*Donovan v. State* (1907), 170 Ind. 123, 83 N. E. 744; *Carr v. State* (1910), 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190; *Stucker v. State* (1908), 171 Ind. 441, 84 N. E. 971; *Donovan v. State* (1916), 185 Ind. 15, 111 N. E. 433; *Messel v. State* (1911), 176 Ind. 214, 95 N. E. 565; *Hahn v. State* (1916), 185 Ind. 210, 113 N. E. 725; *Goodman v. State* (1919), *ante* 70, 121 N. E. 826. Unless the bill of exceptions is signed by the judge and afterwards filed with the clerk, and this fact is affirmatively shown in the record, it forms no part of the record, and cannot be considered. In this case the record contains what purports to be a bill of exceptions "relating to the instructions and the rulings of the court thereon," but, as it is not affirmatively shown by the record that it was filed with the clerk, it is not a part of the record, and cannot be considered. It follows that no question is presented on the giving or refusing of instructions.

The appellant contends that the verdict of the jury is not supported by sufficient evidence; that when there is a reasonable doubt whether a defendant's guilt

2. is satisfactorily shown, he must be acquitted. It is not necessary on appeal that the evidence should show the defendant's guilt beyond a rea-
3. sonable doubt in order for it to be sufficient to sustain the verdict of the jury. All that is required on appeal is that there shall be some evidence sustaining every material allegation in at least one count of the affidavit. In determining whether a verdict is sustained by sufficient evidence a court of appeal will not weigh conflicting evidence, but will consider only that tending to support the judgment. A judgment will not be reversed for insufficiency of evidence unless there is a total lack of evidence to support some essential element of the offense.

The affidavit in this case was filed on November 18,

1918, and the evidence shows that on November 13, 1918, the officers of the law, armed with a search warrant, searched the premises occupied at the time by the appellant at Tenth and Crawford streets, in the city of Terre Haute, Vigo county, Indiana, and found on the premises eight quarts of whisky in bottles and another quart bottle partly full of whisky; that the premises so occupied by appellant consisted of a two-story house with double store room in front, and living rooms down stairs and up stairs and in the rear. The whisky was in bottles in a sack in a closet in the living apartments, and a dresser was standing before the door of the closet, partly concealing it.

The officers again visited defendant's place at Tenth and Crawford streets, in the city of Terre Haute, Indiana, on November 16, 1918, and found a quart bottle partly filled with whisky, and a bar bottle partly filled with whisky and four whisky glasses. The defendant, Jesse Barker, was in the house at that time, and, after the whisky was found, one of the officers said to the defendant, "Where is the rest of your whisky Jess?" And he said, "That's all I have got. Honest to God, that's all there is around here." Defendant was then asked by one of the officers if he had a government stamp and he said, "You are damned right, I bought one yesterday." The evidence shows that he paid to the deputy collector of internal revenue, on November 15, 1918, the sum of \$25 for retail liquor dealer license, and \$12.50 penalty. This license covered the period from July 1, 1918, to June 30, 1919, and was issued to defendant as retail liquor dealer at Tenth and Crawford streets, in the city of Terre Haute, Indiana.

This evidence is sufficient to sustain a verdict

4. of the jury finding the defendant guilty, as charged in the affidavit.

The evidence sustains the verdict. No error appearing in the record, the judgment is affirmed.

NOTE.—Reported in 124 N. E. 681.

### PHILLIPS v. GAMMON ET AL.

[No. 23,310. Filed October 29, 1919.]

1. PLEADING.—*Complaint.—Motion to Make More Specific.—Wills.*—Where a complaint to set aside a will was based on the grounds of unsoundness of mind, undue execution and undue influence, the first two being in the language of the statute, a motion to make more specific was properly denied, for the reasons that such motion is unavailing as against the grounds stated in the language of the statute, and, though undue influence is not a statutory ground, it is an authorized one and evidence in support thereof was admissible under the allegations of unsoundness of mind and undue execution. p. 498.
2. TRIAL.—*Motions.—Venire de Novo.—Arrest of Judgment.*—A motion, though termed a motion in arrest of judgment, will be treated as a motion for a *venire de novo* where it is directed to the verdict alone and the remedy sought is unmistakably that which can only be had by a motion for a *venire de novo*. pp. 499, 500.
3. JUDGMENT.—*Trial.—Motions for Venire de Novo and in Arrest.—Distinction.*—While a motion for a *venire de novo* and a motion in arrest of judgment must both be made before judgment, the former should precede the motion for new trial and is confined to uncertainty, ambiguity or imperfections in the verdict or findings, while the latter challenges the pleadings upon which the verdict or finding rests and cuts off the right to subsequently file a motion for new trial. p. 499.
4. PLEADING.—*Motions.—Character of.—Determining From Prayer.*—Though the name and prayer of a pleading or motion may be advisory in determining its character and effect, they will not be allowed to control the remedy chosen as shown by the facts stated. p. 500.
5. APPEAL.—*Striking out Motion for New Trial.—Presumption.*—Error of the trial court in striking from the record a proper motion for new trial will be presumed harmful in the absence of a showing to the contrary. p. 500.

From Warrick Circuit Court; *Ralph E. Roberts*, Judge.



Action by Shirley Gammon and others against Willard Phillips. From a judgment for the plaintiffs, the defendant appeals. *Reversed.*

*Roscoe Kiper and Henry F. Fulling*, for appellant.

*C. J. Lindsey, S. B. Hatfield, W. S. Hatfield, John R. Brill, F. H. Hatfield and John W. Brady*, for appellees.

MYERS, J.—Appellees brought this action to contest and set aside the last will of Payton D. Gammon, on the ground that at the time the will was executed he was: (1) a person of unsound mind; (2) that he “was under undue influence”; and (3) that the pretended will was unduly executed. The complaint was in one paragraph and a general denial thereto formed the issues submitted to a jury, resulting in a verdict and judgment setting the will aside on the ground of unsoundness of mind. The trial court granted Phillips as executor permission to prosecute this appeal. In this court he assigns and relies on alleged errors of the court below: (1) In overruling his motion to make the complaint more specific; and (2) in sustaining appellees’ motion to reject and strike from the files his motion for a new trial.

As to the first assignment of error it will be noticed that the first and third grounds for contest are stated in the language of the statute. The second cause

1. is not expressly made a statutory ground for contest, but it is so authorized and not infrequently relied on by contestors. The three statements here counted upon—“unsoundness of mind,” “undue execution” and “undue influence”—all have a well-known and well-recognized legal meaning when used, as in this case, to state a cause of action. However, under the allegations of unsoundness of mind and undue execution, any evidence tending to show undue influence is admissible. *Clearspring Tp. v. Blough* (1909), 173 Ind. 15, 24, 88 N. E. 511, 89 N. E. 369. Furthermore, this court

has ruled that a motion to make more specific is unavailable when the statement of the grounds of contest is in the language of the statute. *McDonald v. McDonald* (1895), 142 Ind. 55, 64, 41 N. E. 336. In the instant case the pleaded facts relied on by the complainants are well within the law affirmed by the case last cited. The motion was properly overruled.

Passing to appellant's second assignment, the record shows that the jury returned its verdict on June 9, 1916.

On June 22, defendants, in writing, filed what

2. they called a motion in arrest of judgment, which was thereupon overruled, and judgment on the verdict in favor of plaintiffs. On July 1, defendants filed their motion for a new trial. On October 16, over defendants' objection and exception, the court sustained plaintiffs' motion to strike from the files and reject defendants' motion for a new trial. Of this ruling appellant complains. The correctness of this ruling depends upon the character of the motion, evidently treated by the trial court as a motion in arrest of judgment. It was so designated by the defendants and the prayer thereof was that the judgment be arrested. In this court counsel for appellant insist that the motion, in fact, was a motion for a *venire de novo*, and should be so construed and treated. This insistence must be sustained.

While a motion for a *venire de novo* and a motion in arrest of judgment must both be made before judgment, yet the province of each is entirely different. The

3. former should precede the motion for a new trial and is confined to uncertainty, ambiguity or imperfections in the verdict or findings of the court as the case may be, while the latter affirms the verdict but challenges the pleadings upon which it rests to authorize it, and cuts off the right of the maker to subsequently file a motion for a new trial. *Cincinnati etc., R. Co.*

v. *Washburn* (1865), 25 Ind. 259, 261; *Boor, Admr.*, v. *Lowrey* (1885), 103 Ind. 468, 3 N. E. 151, 53 Am. St. 519; *Shaw v. Merchants Nat. Bank* (1877), 60 Ind. 83, 94; *Kelley v. Bell* (1909), 172 Ind. 590, 596, 88 N. E. 58; *Bennett v. Simon* (1898), 152 Ind. 490, 491, 53 N. E. 649; *Potter v. McCormack* (1891), 127 Ind. 439, 440, 26 N. E. 883; *Smith v. State, ex rel.* (1895), 140 Ind. 343, 350, 39 N. E. 1060.

It is not the name given to a pleading or motion or the prayer thereof that determines its character and effect.

The name and prayer may be advisory, but

4. neither will be allowed to control the remedy selected as shown by the facts in the pleading or motion. *McClanahan v. Williams* (1893), 136 Ind. 30, 35 N. E. 897; *McGuffey v. McClain* (1892), 130 Ind. 327, 331, 30 N. E. 296; *Goecker v. McOsker* (1912), 177 Ind. 607, 615, 98 N. E. 724; *Crawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 275, 98 N. E. 177. The motion in question is directed to the verdict alone, and the remedy sought thereby is unmistakably that

which can only be had by a motion for a venire

2. *de novo*. *Bohr v. Neuenschwander* (1889), 120 Ind. 449, 456, 22 N. E. 416; *Mitchell v. Friedley* (1891), 126 Ind. 545, 548, 26 N. E. 391; *Johnson v. Hosford* (1887), 110 Ind. 572, 575, 10 N. E. 407, 12 N. E. 522; *Perkins v. Hayward* (1890), 124 Ind. 445, 450, 24 N. E. 1033; *Richards v. Wilson* (1916), 185 Ind. 335, 363, 112 N. E. 780. But treating this motion, as we must, as one for a *venire de novo*, no error intervened in overruling it, for by reference to the verdict it will be seen that it is not subject to the claimed imperfections or defects.

It is next insisted that the court erred in sustaining appellees' motion to strike from the record and reject appellant's motion for a new trial. The motion

5. for a new trial is before us. It was timely filed.

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Smith v. State—188 Ind. 501.

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It contains causes properly assigned in support of the motion, and follows approved procedure in presenting questions thus raised on appeal to this court. The facts thus disclosed by the record in connection with our disposition of the so-called motion in arrest of judgment require us to hold that the action of the trial court in sustaining this motion to strike out was erroneous, and in the absence of a showing to the contrary, this ruling will be presumed harmful to appellant. *Rowe v. Peabody* (1885), 102 Ind. 198, 204, 1 N. E. 353; *Ervin v. State, ex rel.* (1897), 150 Ind. 332, 346, 48 N. E. 249; *Crawfordsville Trust Co. v. Ramsey, supra.*

For the error of the court in sustaining appellees' motion to strike from the record and reject appellant's motion for a new trial, the judgment in this cause is reversed, with instructions to the trial court to set aside its ruling in that respect, and to overrule the motion to strike from the record appellant's motion for a new trial, and to permit the motion for a new trial to be reinstated, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 124 N. E. 699. .

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### SMITH v. STATE OF INDIANA.

[No. 23,506. Filed October 29, 1919.]

1. CRIMINAL LAW.—*Grand Jury.—Irregular Organization.—Calling Bystander.—Plea in Abatement.*—Where a member of the grand jury regularly called was excused and a substitute member, at the direction of the court, was called by the sheriff from the bystanders and sworn as a member of the jury, the jury thus organized was irregular and could not return an indictment which could stand when properly attacked; and a plea in abatement stating such facts, and disclosing that the defendant had not by conduct or omission waived the defect, should have been sustained. p. 502.

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Smith v. State—188 Ind. 501.

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2. **CRIMINAL LAW.—Plea in Abatement.—Negating Defenses.**—A plea in abatement to an indictment must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat the plea. pp. 503, 504.
3. **CRIMINAL LAW.—Organization of Grand Jury.—Calling Bystander.**—A plea in abatement to an indictment for assault and battery with intent, based on irregularity in the organization of the grand jury through the improper substitution of a bystander for an excused member, was insufficient as against a demurrer where the record shows that the defendant, before the filing of the plea, made several requests for continuances, with actual or constructive knowledge of the facts, the requests under such circumstances constituting a waiver of the right to make such attack. pp. 503, 505.
4. **CRIMINAL LAW.—Plea in Abatement.—Negating Defenses.—Sufficiency.**—Though it may be presumed that the proceedings of the grand jury are regular, it may also be a fact that they are defective, and ignorance alone of the defect is not sufficient to excuse a delay of eighteen months in attacking the indictment by a plea in abatement for irregularity in the organization of the grand jury; but ignorance after due diligence to learn is an excuse for such delay. pp. 503, 504.

From Fulton Circuit Court; *Smith N. Stevens*, Judge.

Prosecution by the State of Indiana against Henry Smith. From a judgment of conviction, the defendant appeals. *Affirmed.*

*William J. Reed* and *J. H. Bibler*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

HARVEY, J.—In this prosecution of appellant upon an indictment for assault and battery with intent to kill, the court sustained a demurrer to appellant's plea in abatement.

The plea alleged that one member of the grand jury regularly called was excused, and that a substitute member was, at the direction of the court, called by

1. the sheriff from among the bystanders, and was sworn as a member of the jury. A jury so organized is irregular and cannot return an indictment

which will stand when properly attacked. See *Stipp v. State* (1917), 187 Ind. 211, 118 N. E. 818. A plea in abatement setting up such facts should be sustained, provided that it discloses that the defendant has not by his conduct, or by omission, waived the defect.

Such a plea must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat the plea. *Rush v. Foos Mfg. Co.* (1898), 20 Ind. App. 515, 519, 51 N. E. 143; *State v. Comer* (1901), 157 Ind. 611, 614, 62 N. E. 452; *C. Callahan Co. v. Wall Rice, etc., Co.* (1909), 44 Ind. App. 372, 89 N. E. 418; *Needham v. Wright* (1895), 140 Ind. 190, 39 N. E. 510.

This plea in abatement was filed more than eighteen months after the indictment was returned, and after six terms of the circuit court had passed. The rec-

3. ord discloses that the defendant had prior to the filing of his plea asked and been granted several continuances. If it be that the court cannot for the purpose of aiding or defeating a plea of abatement look outside of the plea, and to the record, or take judicial knowledge of the record, which proposition we do not here decide, still the fact that the record discloses such requests shows that the supposition that he had requested such rulings is well justified; and if the supposable requests were made with knowledge, actual or constructive, of facts which would make the indictment subject to successful attack, then such supposable requests constituted a waiver of the right to make such attack.

Appellant evidently recognized this as the correct rule by offering ignorance as an excuse for his delay, and for that purpose he alleged in his plea that he was

4. a resident of and was in the State of Iowa when the grand juror was substituted, and when the grand jury made its investigation and returned the in-

dictment, and had no knowledge of the fact of such substitution, or method of such substitution, or of the fact that the grand jury was investigating any charge against him. As a further excuse, the plea further alleges that an attorney living at Knox, Indiana, who represented him in defending against said indictment, had no knowledge of such facts until the — day of April, 1919. The plea was sworn to and filed on April 8, 1919.

The plea is subject to the supposition that counsel had represented defendant from the date of said indictment;

such a supposition is supported to some extent by

2. the fact disclosed in the plea that, six months before the indictment, defendant was charged by affidavit in the same court with the same offense, and that he was during said six months represented in said matter by counsel; and the plea does not negative the supposition that he was represented by counsel continuously from the date of said indictment, nor does the plea negative the fact that he may have been represented during the existence of said indictment by other counsel who knew said facts. To constitute a proper negative in such matters, the plea must allege facts showing the contrary. *State v. Drake* (1890), 125 Ind. 367, 25 N. E. 434.

This plea in abatement does not state that the defendant or his counsel used any diligence whatever to learn whether or not the grand jury was lawfully

4. organized. While it may be presumed that such proceedings are regular, it may also be a fact that they are defective. Ignorance alone of such defect is not a sufficient excuse. Ignorance, after due diligence to learn, is an excuse. *Rice v. State* (1861), 16 Ind. 298.

So far as appears by this plea, this defendant had every opportunity to learn early, through his counsel, any and every fact bearing upon the sufficiency of the

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Young v. State—188 Ind. 505.

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3. proceedings; and it is easily supposable that defendant's counsel did not know of the defect in the selection of the substitute grand juror simply because counsel had not earlier investigated the showing made by the record.

The plea in abatement was properly held insufficient. The other propositions made and insisted upon depend upon the sufficiency of the plea in abatement, and are determined against appellant by what has been said.

The judgment below is affirmed.

NOTE.—Reported in 124 N. E. 698. Grand jury, irregular selection, effect, 10 Ann. Cas. 964, Ann. Cas. 1918A 1080, 16 C. J. 407-410.

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### YOUNG v. STATE OF INDIANA.

[No. 23,553. Filed October 31, 1919.]

INDICTMENT AND INFORMATION.—*Use of Disjunctives.—Uncertainty.*—An indictment for the unlawful possession of intoxicating liquors, as defined by the Prohibition Act, §8356d Burns' Supp. 1918, Acts 1917 p. 15, alleging more than one of the purposes made illegal by the statute, and connecting them by the disjunctive "or" instead of the conjunctive "and," is defective for uncertainty.

From Hamilton Circuit Court; *Frank S. Campbell*, Special Judge.

Prosecution by the State of Indiana against Rufus Young. From a judgment of conviction, the defendant appeals. *Reversed.*

*Floyd G. Christian, Ralph H. Waltz and Thomas E. Kane*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

LAIRY, C. J.—Appellant was convicted of having the unlawful possession of certain intoxicating liquors as defined by §8356d Burns' Supp. 1918, Acts 1917 p. 15.



The affidavit on which the judgment of conviction was based alleges, disjunctively, that appellant had possession of the whisky, "for the purpose and with the intent of unlawfully selling, bartering, exchanging, giving away, furnishing or otherwise disposing of the same contrary to the form of the statute in such cases made and provided." A motion to quash was addressed to this affidavit, which was overruled, and this ruling is assigned as error.

In a recent case, in which a similar question was presented, this court held that the several purposes for which the liquor was kept, when more than one is alleged, should be joined by the conjunctive "and," and not by the disjunctive "or," and that the use of the latter connective in such a pleading renders it defective for uncertainty. *State v. Sarlin* (1919), *ante* 359, 123 N. E. 800. See, also, *State v. Hatfield* (1915), 87 N. J. Law 124, 93 Atl. 677; *State v. Shadroui* (1915), 89 Vt. 520, 96 Atl. 8; *People, ex rel. v. Schatz* (1900), 50 App. Div. 544, 64 N. Y. Supp. 127; *State v. Seeger* (1902), 65 Kan. 711, 70 Pac. 599.

Under the rule as announced in the cases cited, the motion to quash should have been sustained on the ground of uncertainty in the affidavit to which it was addressed.

Judgment reversed, with instructions to sustain appellant's motion to quash the affidavit.

NOTE.—Reported in 124 N. E. 679. Indictment, use of disjunctive "or," see 51 L. R. A. (N. S.) 133, 22 Cyc 296.

## STIDHAM ET AL. v. STERRETT ET AL.

[No. 23,252. Filed October 31, 1919.]

1. JUDGES.—*Change of.—Time for Filing Motion.*—Where, in a drainage proceeding, the court had heard argument on the first ground of remonstrance—that the report of the drainage commissioners was not according to law—and had ordered it referred to the commissioners for correction, a proper motion for change of judge, filed before the beginning of the trial on the other issues, was timely, and should have been granted, as there had been no submission of a question of fact such as is involved in the trial of an issue made. p. 508.
2. JUDGES.—*Change of.—Discovery of Prejudice.—Rules of Court.*—Where there is a showing that the facts as to the bias and prejudice of the judge are not discovered until the day on which the motion for change is filed, a rule of court that an application for change of judge shall be made at least a specified number of days prior to a certain stage of the proceedings has no force. p. 509.
3. APPEAL.—*Review.—Parties Entitled to Allege Error.*—Though a party that asked for a change of judge did not ask for a new trial, an appellant that excepted to the denial of the application for the change and assigned the denial as a cause for new trial, has a right to have reviewed such assignment, since the application of one coparty for a change of judge binds and directly affects all coparties. p. 509.
4. APPEAL.—*Error in Denying Change of Judge.—Presumption.*—The duty to grant a proper motion for change of judge being imperative, the error in denying an application therefor, while not rendering void the subsequent proceedings, is of such vital importance that it is presumed to be harmful. p. 509.

From Tippecanoe Circuit Court; *Burton B. Berry*, Judge.

Petition by Kiley C. Sterrett and others for a drain, to which Charles Stidham and others filed remonstrances. From a judgment for the petitioners, Sterrett and others appeal. *Reversed.*

*Allen Boulds* and *George P. Haywood*, for appellants.  
*Kiley C. Sterrett*, for appellees.

HARVEY, J.—This proceeding is based on a petition

alleging that a certain ditch theretofore established by order of court is out of repair and not sufficient to properly perform its intended purpose. That the same can be made to perform said purpose by straightening and tiling the same, covering the tile, and by adding branches thereto. After proper proceedings without remonstrance on the part of any defendant, the court found the petition sufficient, and referred the same to drainage commissioners. The commissioners reported favorably and recommended the addition of nineteen branches. Thereupon numerous remonstrances were filed. The first cause in all said remonstrances was that the report was not according to law, the claim of remonstrators being that the report should more specifically describe said branches.

The court heard argument on this first ground of remonstrance, but upon no other point. The court referred the report to the commissioners, with di-

1. rection that they make the same more specific as to said branches. This was done. Thereafter a day was set for the trial of the issues made by remonstrance. Before the beginning of such trial one Martin, a remonstrator, filed a sufficient motion for a change of judge. This motion was overruled, and to this ruling said Martin and all other remonstrators excepted. The denial of said change is a cause set out in the motion of appellant for a new trial.

Appellees claim that the motion for a change of judge came too late, as the cause had theretofore been submitted to the court for hearing, and had been partially heard.

As we read the record, there had been a submission of only one question to the court, and that was a proposition of law at a stage of the proceedings at which, it may be fairly said, the issues were being formed, to wit, the preparation and filing of a proper report. No ques-

tion of fact, such as is involved in the trial of an issue made, had been theretofore submitted to the court.

If there be a rule of said circuit court to the effect that an application for a change of judge shall be made at least a specified number of days prior to a

2. certain named stage of the proceedings, such a rule had no force here, as the affidavit here being considered alleged that the facts as to the bias and prejudice of the judge were not discovered until the day the motion for such change was filed. The application for a change of judge was within time, and a denial of the same was erroneous.

It is claimed that, if it be held that the application was filed within time, the party appealing and here assigning as error the order denying the change, has no standing so far as said question is concerned, because Martin, the party who asked the change of venue, did not ask for a new trial.

We find that the party appealing excepted to the denial of the application for a change of judge, asked for a new trial, and assigned said refusal to grant

3. such change as a cause therefor. Inasmuch as the application of one joint party for a change binds and directly affects all coparties, it would seem to follow that each coparty should have a right to review said ruling on appeal, and, if so, should be permitted to save said question by exception and motion for a new trial. *Dill v. Frazee* (1907), 169 Ind. 53, 79 N. E. 971.

The duty to grant the motion being imperative, we hold that the then judge should not have proceeded with the cause. Though the proceedings thereafter

4. are not void, the error in refusing the change is of such vital importance, and presumed to be harmful, that the proceedings should have been then and there stopped and submitted to another judge.

Because other questions here presented, on the fur-

ther proceedings, may not again be presented under the same circumstances, we do not pass upon them.

Judgment is reversed, with the direction that the motion for a new trial and the motion for a change of judge be granted.

NOTE.—Reported in 124 N. E. 697.

### JENKINS v. STATE OF INDIANA.

[No. 23,545. Filed November 5, 1919.]

1. INTOXICATING LIQUORS.—*Affidavit.—Negating Exceptions.*—An affidavit charging the defendant with having intoxicating liquors in his possession with intent to sell, etc., in violation of Acts 1917, ch. 4, p. 15, §4, is not insufficient because it fails to negative the exceptions, the exceptions in the statute not being a part of the definition of the offense. p. 511.
2. INDICTMENT AND INFORMATION.—*Negating Exceptions.*—Where exceptions are in a subsequent section of the statute, or in a proviso of the same section, they need not be negated. p. 511.
3. CRIMINAL LAW.—*Appeal.—Grounds of Review.*—Where the defendant chose as grounds of his motion to quash the affidavit that the facts stated were not sufficient to constitute a public offense, he will not be permitted on appeal to attack the affidavit on a different theory; it is only where the court sustains the motion that the court on appeal will look beyond the grounds specified to sustain the court's action. p. 511.
4. INTOXICATING LIQUORS.—*Evidence.—Sufficiency to Show Intent.*—The evidence is reviewed and held sufficient to show that the defendant was the owner of intoxicating liquor and that he had it with the intent to dispose of it unlawfully as charged. p. 512.
5. CRIMINAL LAW.—*Arrest of Judgment.—Error Available.*—Anything in the affidavit that may be cured by evidence is not available in a motion in arrest of judgment. p. 514.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Prosecution by the State of Indiana against Fossie L. Jenkins. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Thomas V. Miller* and *Gene Williams*, for appellant.

*Ele Stansbury*, Attorney-General, and *Edward M. White*, for the state.

TOWNSEND, J.—Appellant was charged by affidavit with having intoxicating liquor in his possession with intent to sell, etc. Acts 1917, ch. 4, p. 15, §4. He was tried by jury, verdict of guilty was returned, and judgment rendered thereon. The errors assigned and relied on for reversal are: (1) The court erred in overruling appellant's motion to quash the affidavit. (2) The court erred in overruling appellant's motion for a new trial. (3) The court erred in overruling appellant's motion in arrest of judgment.

Appellant's motion to quash the affidavit is based upon the ground that "the facts in said affidavit do not constitute a public offense." Appellant claims under this heading of error that the affidavit is bad because it fails to negative all of the exceptions in the statute.

The affidavit charges the appellant with having and keeping in his possession nine pints of whisky with the intent to sell, barter, give away, etc., under §4,

1. *supra*. A charge of this kind under this section need not negative the exceptions in the statute, because they are not a part of the definition of
2. the offense. When exceptions are in a subsequent section or in a separate proviso in the same section, they need not be negated. *Yazel v. State* (1908), 170 Ind. 535, 538, 84 N. E. 972; *State v. Paris* (1912), 179 Ind. 446, 453, 101 N. E. 497; *State v. Sarlin* (1919), *ante* 359, 123 N. E. 800.

Appellant also contends under this heading of error that the affidavit is too indefinite and uncertain; but this is not the ground of appellant's motion. Having

3. chosen the ground of his motion in the trial court, he will not be permitted to attack the affidavit here on a different theory. *Gilmore v. State* (1911),

177 Ind. 148, 97 N. E. 422. Had the trial court sustained this motion to quash, we would then look beyond the grounds which were specified in the motion to sustain the court's action. *State v. Sarlin, supra*. But having chosen the ground stated in the motion, appellant is deemed to have waived his right to question the affidavit for uncertainty.

Under the second error relied on for reversal, appellant presents the sufficiency of the evidence. He specifically claims that there was no evidence from

4. which the jury might have inferred that appellant had the liquor in his possession with the intent to sell, barter, give away, or otherwise dispose of it in violation of law. That is to say, his contention narrows itself to the proposition that there was no evidence to show intent. On this point the evidence shows that appellant boarded an interurban car at Union City, Indiana, on the day that he was arrested. The motorman on that car testified that he observed appellant approaching the car at Union City, and that his attention was more particularly called to appellant by the fact that appellant made a motion which indicated that he was pointing out the motorman to a man who was walking with appellant. This motorman testified that appellant and his companion were observed by him when about fifty feet away; that they approached him, passed by him and boarded the interurban car. This motorman observed that appellant was carrying under his arm a pasteboard box, the same box that was afterwards taken off the car at Winchester, Indiana, when appellant was taken off. The evidence further shows that appellant rode on this interurban car, and at Winchester, Randolph county, Indiana, officers boarded the car and arrested appellant; that when arrested, he had whisky in bottles stored about his clothing, in his pockets and under a sweater which he was wearing. Ap-

pellant's explanation of his possession of the liquor that he had in his pockets and stored about his clothing was that a man who got into this interurban car and sat in the same seat with appellant got up as if to leave the seat temporarily, and began handing appellant bottles of whisky to hold until he returned; that he handed him one bottle and appellant stored that away and then, to use the language of appellant, "he kept on coming with them," until appellant had a number of bottles stored in his pockets and about his clothing. His explanation about the pasteboard box containing liquor was that it was placed under the seat by someone other than himself; that he did not know anything about it until he was taken off the car at Winchester. Appellant's claim was that he owned neither the whisky that was in the box nor the whisky that he had stored about his clothing.

Appellant's explanation of how he came into possession of this liquor is one that the jury, from the circumstances in this case, had a right to disbelieve. They had a right to believe the motorman, who testified that he saw appellant carrying this box when he boarded the car, and that it was the same box that the officers took off the car at Winchester. Appellant's explanation of how he came into possession of the liquor found stored about his clothing is rather remarkable. From appellant's whole story the jury had a right to believe that he was giving a false explanation both as to the ownership and possession of the liquor. Then the next step to infer the unlawful intent seems to us rather easy. We think the evidence was entirely sufficient to show that appellant was the owner of the liquor in question, and that he had it with the intent to unlawfully dispose of it. The court did not err in overruling appellant's motion for a new trial.



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Union Traction Co. v. Berry, Admr.—188 Ind. 514.

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The next question presented by appellant is the error of the court in overruling appellant's motion in arrest of judgment. This has already been disposed of

5. by what we have said in the motion to quash.

Anything in the affidavit that may be cured by evidence is not available in a motion in arrest of judgment.

The judgment of the trial court is affirmed.

NOTE.—Reported in 124 N. E. 748.

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### UNION TRACTION COMPANY OF INDIANA v. BERRY, ADMINISTRATOR.

[No. 23,230. Filed January 31, 1919. Rehearing denied November 7, 1919.]

1. NEGLIGENCE.—*Ordinary Care.*—*Jury Question.*—It is the duty of the jury to determine, as a question of fact in each case, whether the conduct of the party on whom a duty rests measures up to the standard of ordinary care as defined by the law. pp. 519, 522, 527, 528.
2. NEGLIGENCE.—*Duty to Use Care.*—*Rule as to Carriers.*—The law does not impose a different or higher duty on carriers of passengers with reference to the exercise of care than it imposes on persons or corporations sustaining other relations involving the exercise of care. (*Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, disapproved.) pp. 520, 523.
3. NEGLIGENCE.—*Definition.*—*Degrees.*—*Duty.*—Negligence is the neglect or violation of the duty to use care; there can be no degrees of negligence, and hence no degrees of duty. p. 520.
4. NEGLIGENCE.—*Duty to Use Care.*—*Question of Law.*—Whether a given relation existing between parties gives rise to a duty to use care is a pure question of law. p. 520.
5. NEGLIGENCE.—*Duty.*—*"Due Care."*—*Standard of Care.*—*Instructions.*—In submitting to a jury a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes, and also to state the rule fixing the standard of care which will measure up to such duty; the duty remains the same under all circumstances and is defined as "due care," "ordinary care," or "reasonable care," which terms have the same significance, and the

## Union Traction Co. v. Berry, Admr.—188 Ind. 514.

- standard of care measuring up to such duty is the care that a person of ordinary prudence would regard as reasonably necessary or proper under the circumstances. pp. 521, 528.
6. NEGLIGENCE.—“*Ordinary Care.*”—“Ordinary care” requires that the acts of care employed and the precautions used must be commensurate to the danger involved under the circumstances of the particular case. p. 522.
  7. TRIAL.—*Instructions.*—*Province of Jury.*—*Negligence.*—The use of such terms as “slight care,” “great care,” or other like expressions in instructions, as indicating the quantum of care that the law exacts under special conditions and circumstances, is misleading, and constitutes an invasion of the province of the jury. pp. 523, 529.
  8. NEGLIGENCE.—*Carriers.*—*Protection of Passengers.*—If greater precautions are required to protect passengers while in transit, it is because the conditions and circumstances surrounding them are different and involve more danger, and not because of the relation of carrier and passenger. pp. 524, 527.
  9. APPEAL.—*Erroneous Instruction.*—*Negligence.*—*Due Care.*—In an action for wrongful death, an instruction which held the defendant railroad company to the “highest degree of care,” etc., was erroneous, and the court on appeal cannot hold it as harmless where, in view of the evidence, the question of the defendant’s negligence was so close that the jury might have been influenced by the erroneous instruction. p. 525.
  10. CARRIERS.—*Ordinary Care.*—*Res Ipsa Loquitur.*—The rule holding carriers, for the protection of passengers, to the degree of care that a person of ordinary prudence would regard as necessary under the particular circumstances does not abrogate the rule of *res ipsa loquitur* as applied in cases involving injuries to passengers, since the latter rule does not depend on the standard of care imposed, but on the nature of the occurrence out of which the injury arises, and may be applied under the rule holding the carrier to ordinary care. p. 530.

From Marion Superior Court (99,476); *Henry N. Spaan*, Special Judge.

Action by Noah D. Berry, administrator of the estate of Charles Elliot, deceased, against the Union Traction Company. From a judgment for the plaintiff, the defendant appeals. *Reversed.*

*J. A. Van Osdol, Joseph R. Morgan, Frederick E. Matson, Ralph K. Kane and James A. Ross*, for appellant.

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Union Traction Co. v. Berry, Admr.—188 Ind. 514.

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*Charles E. Cox, Frank S. Roby, Edward W. Little and Earl W. Little, for appellee.*

LAIRY, J.—Appellee, as administrator of the estate of Charles Elliott, recovered a judgment in the trial court for damages resulting from the death of said Elliott, which he alleges was caused by appellant in the operation of one of its cars.

The record shows that Elliott was a passenger on one of appellant's street cars in the city of Muncie at the time he received the injury which caused his death. The car on which he was a passenger was operated on a track which extended across a bridge of White river, and which was constructed so close to the girders as to leave only a narrow space between the superstructure of the bridge and the side of the car passing over the bridge on said track. The car on which he was riding was an open car with cross seats extending entirely across the car and with a running board along the right side. When he boarded the car he took a standing position on the rear platform, and as the car approached the bridge he decided to change his position and to occupy one of the cross seats. In attempting to do so, he stepped from the rear platform to the running board when the car was close to the bridge and, while on the running board attempting to enter a seat, his body came in contact with the superstructure of the bridge, causing him to be knocked from the running board and killed.

The complaint alleges that the space between the superstructure of the bridge and the side of a passing car was not sufficiently wide to permit the decedent and other passengers on the car to pass between the same, which fact was well known to the defendant. It is not alleged that such condition was due to any negligence or want of proper care on the part of appellant in the

construction of either the bridge or the tracks. The negligence imputed to appellant by the complaint is charged in the language following: "Plaintiff further says that defendant was negligent and careless in the operation of said car at said time and place in this, to wit: That the defendant company ran said car in such close proximity to said post and structural work of said bridge as to endanger the lives and limbs of the decedent and other passengers while riding on defendant's said cars; that the defendant negligently and carelessly failed to give the decedent any warning of any kind, and of the car's approach to said bridge, and of the danger of colliding with said posts and girders."

By the answer of general denial, an issue of fact was formed as to the negligence of appellant, which was submitted to the jury to be decided. Appellee asserted that, in the discharge of the duty to exercise due care for the safety of appellee's decedent, it was necessary to warn him of the danger which threatened him and which he was approaching, and that appellant failed to take such precaution. This was denied by appellant. This presented an issue of fact which the jury was required to decide from a consideration of all the surrounding conditions and the attendant circumstances as disclosed by the evidence. The evidence shows without dispute that no notice was given to appellee's decedent of the approach of the car to the place of danger described. This narrows the issue of fact thus presented to the single question: Under the existing conditions and the attending circumstances as shown by the evidence, was it incumbent on appellant to take the precaution of warning appellee's decedent of the car's approach to the bridge in order to measure up to the standard of care imposed on it by law? If the jury determined that the standard of care imposed required the exercise of such precaution, under the conditions and

circumstances shown, this established the negligence of appellant.

As bearing on this question there was evidence to show that the track was so close to the side of the bridge as to expose persons on the running boards or passing cars to the danger of coming in contact with the superstructure of the bridge, and that such danger was known to appellant and its employes; and that such danger had been recognized by such employes in stopping cars before entering the bridge and requiring passengers standing on the running board to get inside the car; and in some instances, when there was not room inside the car, requiring passengers standing on the running board to alight and walk across the bridge after which they were permitted again to board the car. There was also evidence from which the jury could have properly inferred that appellee's decedent knew of the dangerous condition, and knew that the car was close to the bridge when he stepped from the platform to the running board. On this point there is evidence that Elliott had lived on West Jackson street where he kept a grocery for about four months immediately preceding his death, and that it was necessary for him to cross the bridge, where he was afterward killed, every time that he went into the business section of the city; that he had crossed this bridge almost daily and sometimes twice a day during the time he had lived there, frequently going on the street car, but generally using his delivery wagon. The evidence further discloses that the car on which Elliott was riding was stopped just prior to the accident with its front end from six to twelve feet west of the entrance to the bridge, for the purpose of receiving passengers. It is undisputed that when the car started from this point it moved up an incline to the entrance of the bridge at a slow rate of speed; that Elliott was on the rear platform of the car facing the bridge; that no one was on

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Union Traction Co. v. Berry, Admr.—188 Ind. 514.

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the running board except the conductor; that after the car started the conductor, after looking back to see that no one was on the running board, stepped up into the car and began collecting fares; that he did not again look back before the accident, and that he gave no warning of the danger.

From a consideration of the conditions and circumstances disclosed by the evidence, the jury was required to decide whether a person of reasonable pru-

1. dence, occupying the position of conductor of the car, would have regarded it necessary or prudent, in the exercise of reasonable care for the safety of the passengers, to give a signal or warning of the danger. If, in the light of the evidence, the jury believed that the exercise of due care would have dictated such a precaution to a person of reasonable prudence so situated, then it was justified in finding that the conductor was negligent in failing to observe it; but, on the other hand, if the jury decided that the exercise of the reasonable care under the conditions and circumstances shown would not have dictated such a course to a person of ordinary prudence, then the appellant should have been acquitted of the charge of negligence. This presented a pure question of fact for the jury to decide, and it was not the province of the court, by any instruction or otherwise, to assume or indicate that the conduct of the defendant as disclosed by the evidence either did or did not measure up to the standard of care imposed by law.

As bearing on the issue of negligence, the court gave the following instruction: "If you find from the evidence in this case that on and about the 23rd day of May, 1914, the defendant was a common carrier of passengers, then I instruct you that it was held to the highest degree of care and diligence for the safety of passengers consistent with the mode of conveyance employed, and that the omission of the defendant to exer-

cise the highest degree of practicable care constituted negligence on its part.”

By the first part of this instruction, preceding the conjunction “and,” the court undertakes to define the

duty which the law imposes on appellant as a

2. carrier of passengers, and by the latter part the court attempts to direct the jury as to the appli-

3. cation of the rule to the case on trial. Objection is made to this instruction on the ground that it

4. invades the province of the jury, the objection being specifically directed to the latter part, but

this part is so closely connected in meaning with what precedes it as to require a consideration of the instruction as a whole. By this instruction the court told the

jury, in substance, that the law imposed a different and a higher duty on carriers of passengers with reference to the exercise of care than rested on persons or corporations sustaining other relations involving the exer-

cise of care. In the case of *Bedford, etc., R. Co. v. Rainbolt* (1885), 99 Ind. 551, the court said: “The rule

that there may be degrees in negligence has long ago been discarded in this state, and when it is said that an occurrence came about through the slight negligence or gross negligence of another, it is, in either case, nothing more than saying that such person was negligent.”

Negligence is the neglect or violation of the duty to use care. If there can be no degrees of negligence, it must

follow that there can be no degrees of duty. Duty is an absolute term. The law requires nothing more than

duty; it will excuse nothing less. The duty to exercise care for the safety of another arises as a matter of law

out of some relation existing between the parties, and it is the province of the court to determine whether such

a relation is shown as gives rise to such duty. In determining whether the relation shown gives rise to a

duty to use care, the court decides a pure question of

law. This question cannot be submitted to a jury. Where a duty to exercise care exists, it is always the same regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care.

In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which

5. the law imposes. This duty is defined by the law as "due care," "ordinary care," or "reasonable care," which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing the standard of care which will measure up to the duty imposed by law. The court should then leave it to the jury to decide whether the acts and conduct of the defendant in respect to the matter before the court measures up to the standard of care fixed by the law. In defining the duty and fixing the standard of care by which the jury is to measure the conduct of the defendant, the court does not consider the facts of the particular case. The duty is the same under all relations, and the standard of care which will measure up to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances as disclosed by the evidence in the particular case. It is for the jury to consider the conditions and circumstances disclosed by the evidence in determining what action should have been taken or avoided, what precautions should have been employed, and what course of conduct should have been pursued in order to measure up to the duty of "due care" which the law imposes. In determining this fact



the jury applies the standard furnished by the court, which is, What would a person of ordinary prudence have regarded as reasonably necessary or proper under the circumstances shown?

It has been frequently said that ordinary care requires that the acts of care employed and the precautions used must be commensurate to the danger involved

6. under the circumstances of the particular case.

Upon this proposition reasonable minds could not well differ. In a recent decision by this court it

1. was said: "But ordinary care ebbs and flows with the danger to be fairly anticipated by a man of reasonable prudence from the circumstances and conditions involved in each case." *Louisville, etc., Traction Co. v. Walker* (1911), 177 Ind. 38, 97 N. E. 151. It may be true, as matter of fact, that the acts of care and precaution which ordinary prudence would suggest, and which would be regarded by a jury as reasonable under circumstances indicating little danger, might be regarded as entirely inadequate under circumstances which would disclose the employment of dangerous agencies involving great danger to life and valuable property; but, in all cases and under all circumstances, it is for the jury to determine the character and the extent of the danger involved, and the amount of care and caution which reasonable care requires in guarding against such danger. The quantum or amount of care required to measure up to "reasonable care" under the circumstances of each particular case is a matter peculiarly within the province of the jury. The quantum of care, the safeguards to be used, the precautions to be observed, the care and foresight to be exercised in each case, must be as variable as the facts involved in different cases are various. It is not practicable for a court to fix and declare as a matter of law the quantum of care or the degree of care that should be exercised under

the conditions and circumstances peculiar to any special case; that duty rests with the jury to be performed under proper instructions from the court.

The use of such terms as "slight care," "great care," "highest degree of care," or other like expressions in instructions as indicating the quantum of care

7. the law exacts under special conditions and circumstances, is misleading, and when so used they constitute an invasion of the province of the jury, whose function it is to determine what amount of care is required to measure up to the duty imposed by law under the facts of the particular case. The law imposes but one duty in such cases, and that is the duty to use due care; and the law recognizes only one standard by which the quantum of care can be measured, and that is the care which a person of ordinary prudence would exercise under like circumstances.

The court is of the opinion that the language of which appellant complains invades the province of the jury.

If the words "highest degree of care practical"

2. are given any significance at all, they must mean, as applied to this case, that the conductor was required to possess and exercise something more than ordinary judgment, ordinary foresight, ordinary prudence and ordinary care to prevent the injury which happened. It has been already stated in this opinion that the duty imposed by the law to use due care is absolute, and is the same under all relations which give rise to a duty to use care. The relation of carrier and passenger does not differ from other relations in this regard. This has been recognized by the courts of this state in holding that a carrier is required to use only ordinary care in keeping its stations and platforms safe for the use of passengers, and in providing facilities for boarding and leaving trains. *Louisville, etc., Traction*

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Union Traction Co. v. Berry, Admr.—188 Ind. 514.

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*Co. v. Walker, supra; Pennsylvania Co. v. Marion* (1885), 104 Ind. 239, 3 N. E. 874.

If greater precautions are required to protect passengers while in transit, it is because the conditions and circumstances surrounding them are different

8. and involve more danger, and not because of the existing relation. As has been said, the surrounding conditions and attending circumstances, as well as the danger involved, present questions for the consideration of the jury in determining what precautions reasonable care required under the facts disclosed in the particular case. This presents a question of fact for the jury, and not one of law for the court. In view of the reasons here presented the court is impelled to disapprove the rule stated in the cases of *Bedford, etc., R. Co. v. Rainbolt, supra; Louisville, etc., R. Co. v. Snyder* (1889), 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60, and both of those cases are overruled as to the point here involved. In numerous other opinions by this court and the Appellate Court language may be found giving expression to the thought that more than due care or ordinary care was required under certain conditions. This may be true as a matter of fact, but it is not generally true as a matter of law. The court should not tell the jury as a matter of law that a defendant is required to exercise more than ordinary care. What precautions ordinary care required under the circumstances shown in the case on trial should be submitted to the jury as a question of fact.

In view of the importance of the question, the court has felt justified in discussing it at some length and giving its reasons in some detail. Not because the question is new, but because our opinions seem to be somewhat confused and conflicting.

If the conditions and circumstances disclosed by the evidence were of such a character as to show negligence

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Union Traction Co. v. Berry, Admr.—188 Ind. 514.

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on the part of defendant so clearly and conclusively as to justify this court in saying that the verdict, could not have been different in the absence of the erroneous instruction, then the court might decline to reverse the judgment on the ground that it was clearly right, and that the error was not prejudicial; but, under the evidence in this case the question of defendant's negligence was so close that the judgment of the jury might have been influenced either way by the slightest indication of the views of the court on the subject. In the light of the evidence it is impossible for this court to say that the error in this instruction did not influence the verdict.

In view of the conclusion reached, other questions which may not arise on a second trial are not considered.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial.

#### ON PETITION FOR REHEARING.

LAIRY, C. J.—In the adoption of the original opinion the court acted advisedly with full knowledge of the great current of authority with which it is apparently in conflict. On petition for rehearing, able briefs have been filed in which authorities from this state and from other states are arrayed and discussed. It must be conceded that the cases generally state the rule to be that carriers of passengers are required to use the highest degree of care practicable; but we cannot think that the courts by the use of such language intended to state that the law exacts a different standard of duty in cases where the relation of carrier and passenger exists from that which it exacts in cases where other relations are shown which give rise to a duty to use care. If it was the purpose to state a distinct standard of duty exacted by law, it is certain that no court has ever undertaken

to define it. The courts have defined the standard of "ordinary care" as "such care as a person of ordinary prudence would use under the facts, circumstances and conditions disclosed by the evidence in a particular case." Under this definition, the party owing the duty to use ordinary care must take into consideration the character and extent of the dangers incident to the business in which he is engaged, and he must regard the conditions under which the thing is done and the circumstances which surround and attend it; and, in view of the nature of the act, undertaking, or business, the dangers incident thereto, and the surrounding conditions and attendant circumstances, he must foresee every danger that a person of reasonable foresight would anticipate, and he must take every means of guarding against such dangers that reasonable judgment and prudence would suggest, and, in case he fails to do an act or to observe a precaution which would have been done or observed under like conditions by a person of ordinary prudence, he fails in that particular to measure up to the standard of duty expressed by the term "ordinary care."

The duty to use ordinary care requires the party on whom the duty rests to consider the character of the act, undertaking, or business in which he is engaged and the probable dangers incident thereto, as well as all other existing conditions and circumstances, and in determining the means to be used, the precautions to be adopted and the care to be generally exercised in view of the probable dangers, and the surrounding circumstances, he is required to exercise such intelligence, foresight, judgment and prudence as a person possessed of ordinary intellectual endowments would exercise in doing the same thing under like conditions and circumstances. This being true, any standard of duty which would exact more than ordinary care would require

more care than a person of ordinary intellectual endowments would be capable of exercising.

It is the duty of the jury to determine, as a question of fact in each case, whether the conduct of the party on whom the duty rests measures up to the stand-

1. ard of ordinary care as defined by the law. In cases where the act, undertaking or business out of which the injury arises is one involving great danger to life or valuable property by reason of the dangerous character of the machinery or other agencies employed, the jury may be justified in finding that a person of ordinary prudence, in view of the danger and the existing conditions and circumstances, would have made use of every reasonable means available, and would have exercised every precaution which reasonable prudence could suggest, to guard against the danger. Conduct on the part of a defendant which measures up to the standard of duty under such conditions and circumstances constitutes ordinary care and nothing more.

In cases where the danger involved is slight, and where the consequences likely to result would not affect life or valuable property, the jury may rightly

8. find as a fact that a person of ordinary prudence would not have adopted the same means or have observed the same precautions as would be required of such a person in the presence of greater danger involving more serious results. It thus appears that the character of the means to be employed, the precautions to be observed, and the acts to be performed or avoided in guarding against danger and preventing injury may vary in different cases according to the dangers involved, the consequences to be apprehended and the other circumstances shown by the evidence. Conduct which would measure up to the standard of ordinary care in one case might fall far short when measured

by the same standard in another case involving other conditions and circumstances.

The duty to use care is a matter of law which arises out of the relation between parties. The duty is the same under all relations in which it arises. The

5. duty does not differ in cases because the relations out of which it arises are different. The standard to be applied in all cases is the same; but the conduct required to measure up to the standard of duty may differ according to the conditions and circumstances shown by the evidence in each case.

It is for the jury to say, as a matter of fact, what conduct will fill the requirement of ordinary care. In deciding the question of fact the jury should not

1. consider the relation out of which the duty arises.

It can make no difference whether the relation between the parties be passenger and carrier, employer and employe, bailor and bailee, or any other relation out of which a duty to use care arises as a matter of law. In deciding the question of fact under discussion, the jury should consider only the dangers involved, the consequences to be apprehended as a result of such danger, and the conditions shown by the evidence.

All persons and corporations engaged as common carriers of passengers are not bound as a matter of law to observe the same precautions and to exercise the same care and vigilance to secure the safety of passengers, for the reason that the means of transportation adopted by one may be stage coaches drawn by horses at a moderate speed over good roads under circumstances which involve little danger to passengers; while the other may carry passengers in coaches drawn by locomotives over railroads at high speed under conditions involving much greater danger to the lives and limbs of the passengers. It may well be that tests which would be regarded as a matter of fact to be sufficient and adequate, when ap-

plied to determine the strength and soundness of the wheels or other parts of the equipment of a stagecoach, would be entirely inadequate as a matter of fact, if employed as a means of testing the parts of locomotives or coaches to determine their fitness to withstand the strain to which they were to be subjected. The duty which the law imposes is the same in both cases, and the standard by which the care is to be measured, in determining whether it comes up to the duty, is the same in both; but when the jury is called on to apply the standard furnished by the court to the conditions and circumstances shown by the evidence, a question of fact arises which it is the province of the jury to decide.

The confusion which has arisen and which has led to the statement in some cases that the law imposes on carriers the duty to exercise the highest degree

7. of care has grown out of a failure to distinguish between what may be decided by a court as a matter of law and what may be determined by a jury as a matter of fact from a consideration of conditions and circumstances disclosed by evidence. The evidence may be of such a nature as to justify a jury in exacting the highest precautions for safety that would suggest themselves to a person of reasonable prudence; but it is not the province of the court to consider the evidence and to state as a matter of law that the circumstances and conditions require the highest precautions. It is not the province of the court to say in any case that the defendant was required under the circumstances shown to use the highest and most effective precautions which would occur to the mind of a person of ordinary intelligence, prudence and skill. If such a requirement is proper under the evidence, it is the province of the jury to so determine; and a court cannot so decide and state without passing on a question of fact and thus in-



vading the province of the jury. In the use of the expression, "highest degree of care," by courts in opinions, there can be little doubt that it was intended to apply to what the jury might properly exact from a consideration of the dangers to be anticipated and the facts and conditions under which the injury occurred as shown by the evidence. That is the sense in which the expression is generally used in the opinions and text-books, and in that sense it may not be inapt, although it is generally inaccurate. It does not follow, however, that the expression can be employed in instructions as stating a standard of duty imposed by law. Such a standard is incapable of a definition which would enable a jury to apply it intelligently to the conditions and circumstances disclosed by the evidence in a particular case. No court should prescribe a rule for the guidance of a jury unless it is able to define and explain the rule in such a way as to enable the jury to apply it intelligently.

It has been suggested that a departure from the rule which imposes on carriers the duty to use the highest degree of care practicable to preserve the safety

10. of passengers has the effect of abrogating the rule of *res ipsa loquitur* as applied in cases involving injuries to passengers. The suggestion is without force. The existence or application of the rule of *res ipsa loquitur* does not in any way depend on the standard of care imposed by law; but it depends entirely on the nature of the occurrence out of which the injury arises. Where the agency or thing which causes the injury is in the exclusive control of the defendant or his agents, and the occurrence which produces the injury is one which in its nature does not ordinarily happen if those in charge exercise due care, the thing itself speaks; and proof of such an occurrence makes a *prima facie* case of negligence against the defendant. The rule is one of limited application, and it would be

out of place here for the court to attempt to state the limitations, as the rule has no application in this case, and is mentioned only incidentally. It may be stated, however, that the application of the rule has not been limited to cases involving injuries to passengers, but it has been applied to cases in which ordinary care has always been the recognized standard. *City of Decatur v. Eady* (1916), 186 Ind. 205, 115 N. E. 577, L. R. A. 1917E 242; *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A 474.

The court as a whole has carefully considered the briefs filed on petition for rehearing; and after such consideration and after consultation every member of the court is satisfied that the rule announced in the original opinion is correct in principle. The court has not reached its conclusion by arrogating to itself any superior wisdom, or by assuming to possess any superior powers of logic or reason; but, from a careful and conscientious consideration of the reasons which we have endeavored to state, the conclusion reached seemed to be inevitable, and it was accordingly adopted.

Rehearing denied.

NOTE.—Reported in 121 N. E. 655, 124 N. E. 737.

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### FLINN v. STATE OF INDIANA.

[No. 23,572. Filed November 18, 1919.]

1. **RAPE.—Sufficiency of Evidence.—Penetration.**—In a prosecution for rape upon a female child under the age of consent, the testimony of the prosecuting witness that she had sexual intercourse with the defendant was sufficient as proof of penetration, where it appeared that she understood the meaning of the term “sexual intercourse.” p. 532.
2. **CRIMINAL LAW.—Appeal.—Evidence.—Weight.**—Though the uncorroborated testimony of the prosecuting witness in a statutory rape case was contradicted by the defendant on every essential element, the court on appeal will not disturb the judgment on the evidence alone, unless there is such an ab-

sence of evidence in respect to an essential element as to present a question of law which must be decided in favor of the defendant. p. 532.

From Lawrence Circuit Court; *James A. Cox*, Judge.

Prosecution by the State of Indiana against Bruce Flinn. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Robert L. Mellen* and *Albert J. Fields*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

MYERS, J.—Appellant was indicted, tried, and convicted in the Lawrence Circuit Court of unlawfully and feloniously committing a rape on a female child under the age of sixteen years. The crime of which appellant was convicted is defined by §2250 Burns 1914, Acts 1913 p. 267. The overruling of appellant's motion for a new trial is the only error relied on for a reversal of the judgment. In support of his motion for a new trial his only contention is that the verdict is not sustained by sufficient evidence. In this connection appellant earnestly insists that the prosecuting witness is without corroboration, and that there is no evidence of penetration.

It is admitted that the prosecuting witness was less than sixteen years of age, and from the evidence disclosed by the record it appears that she under-

1. stood the meaning of the term "sexual intercourse." She testified that she and appellant had sexual intercourse. Her testimony was sufficient as to every essential fact necessary to support the charge. True, she was squarely contradicted by appellant as to every essential element necessary to warrant a conviction. As we read this record, the controlling question was for the jury to determine whether it would believe the prosecuting wit-

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Colondro v. State—188 Ind. 533.

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ness or this appellant. Evidently from the verdict the jury gave the testimony of the prosecuting witness the greater weight. As said in *Shular v. State* (1902), 160 Ind. 300, 307, 66 N. E. 746, 748: "The rule is well settled that before this court, upon appeal, is warranted in disturbing a judgment in a criminal prosecution on the evidence alone, there must be such an absence of evidence in respect to some fact or element material to the crime charged as to present a question of law, which, under the circumstances, must be decided in favor of the convicted party."

We have read all the evidence as set forth in the record, and we are unable to affirm that appellant's case is one within the rule announced entitling him to a favorable ruling. If the jury had believed appellant and not the girl, then the verdict should have been in his favor, but it is not our province to weigh the evidence.

Judgment affirmed.

NOTE.—Reported in 124 N. E. 875.

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### COLONDRO v. STATE OF INDIANA.

[No. 23,563. Filed November 18, 1919.]

1. CRIMINAL LAW.—*Self-Defense.—Right to be in Place.—Defendant's Belief.*—The defendant's belief that he is in a place where he has a right to be, coupled with the fact that he is so suddenly attacked with a deadly weapon that there is no opportunity to escape, perfects a right of self-defense; the belief alone goes only to rebut his bad faith in bringing on the conflict. p. 535.
2. CRIMINAL LAW.—*Instructions.—Requests.*—If the defendant desired certain principles more particularly applied to his theory of defense, he should have tendered instructions on this phase of the case. p. 535.
3. WITNESSES.—*Impeachment.—Contradictory Statements.*—Where the jury finds that a witness has made statements out of court at variance with his testimony, the fact may tend to

impeach the recollection or truthfulness of the witness, and the jury may consider the point in determining the weight to be given his testimony. p. 535.

4. CRIMINAL LAW.—*Abstract Instruction.—Harmless Error.—Witnesses.*—In a prosecution for murder, resulting in a conviction for manslaughter, an instruction that, if the jury believed from the evidence that the moral character of any witness had been successfully impeached on the trial, then that fact might be considered in estimating the weight of his testimony, was erroneous where there was no evidence on the subject; but, the instruction being on a subsidiary matter, the error was harmless, in view of evidence conclusively establishing the defendant's guilt as found by the verdict. p. 536.
5. CRIMINAL LAW.—*Remarks of Court on Testimony.—Harmless Error.*—In a prosecution for murder, resulting in a conviction for manslaughter, the remark of the trial judge, in reference to an exception taken by counsel for the defendant during the latter's examination, that the question was not improper as assuming anything, because the defendant "testified about going forward and going away and going back," though erroneous, was harmless where the evidence conclusively established the defendant's guilt as found by the verdict. p. 539.

From Lake Superior Court; *Walter T. Hardy*, Judge.

Prosecution by the State of Indiana against Michael Colondro. From a judgment of conviction, the defendant appeals. *Affirmed.*

*C. B. Tinkham* and *Ralph W. Ross*, for appellant.

*Ele Stansbury*, Attorney-General, *A. B. Cronk* and *Dale F. Stansbury*, for the state.

TOWNSEND, J.—Appellant was indicted for murder, tried by a jury, and convicted of manslaughter.

He complains of the court's instructions Nos. 7, 9 and 10 on the subject of self-defense, because they base appellant's right to self-defense on his being "in a place where he had a right to be so far as his assailant was concerned." Appellant's counsel says that none of these instructions takes into account the proposition that a person, in a place where he has no right to be so far as his assailant is concerned, may be suddenly attacked

with a deadly weapon and driven to the wall. Counsel further claims error in these instructions because they do not take into account appellant's good faith in believing that he was where he had a right to be so far as his assailant is concerned.

In counsel's second claim he is not quite accurate. Appellant's belief that he was in a place where he had a right to be does not make his right of self-de-

1. fense; but it goes to rebut his bad faith in bringing on the conflict, and, when coupled with the fact that he is so suddenly attacked with a deadly weapon that there is no opportunity to escape, his right of self-defense is perfect.

Appellant's counsel says that there was evidence from which the jury might infer that appellant was knowingly where he had no right to be, but that this evidence was only shadowy and not legally conclusive, and that therefore these instructions misled the jury into thinking that appellant could never have the right of self-defense when in a place where he had no right to be, so far as his assailant is concerned.

• Appellant admits that these instructions given by the court are correct in principle, but his complaint is that these principles are not elaborately enough ap-

2. plied to his theory of defense. If appellant wanted these principles more particularly applied to his theory, he should have tendered instructions on this phase of the case. *Colee v. State* (1881), 75 Ind. 511, 516. Counsel does not call our attention to any instructions tendered by him and refused by the court. The court did not err in the above instructions on the points claimed by the appellant.

Appellant next complains of the court's instruction No. 18. This instruction told the jury, in substance, that, if they found that any witness had made

3. statements out of court at variance to his testi-

mony on the stand, this might tend to impeach the recollection or the truthfulness of the witness, and the jury might consider this in determining the weight to be given to the testimony of such witness.

Thus far the instruction is correct and is favorable to appellant, for he attempted to show that some of the state's witnesses had made statements out of court at variance to their testimony on the stand.

The court, however, closed the above instruction with this sentence: "And if you believe from the evidence

that the moral character of any witness, or witnesses, has been successfully impeached on this trial, then that fact may be taken into consideration in estimating what weight you ought to give to their testimony." This sentence in the instruction covers a phase of the law on which there is no evidence in the case. It was therefore erroneous and should not have been given. Instructions should announce the law applicable to the evidence. It is error for the court to announce propositions of law, even though correct, where there is no evidence on that subject. The reason for this is obvious. The jury are trying to apply all of the instructions of the court to the evidence, and the court, by instructing outside of the evidence, misleads the jury by practically telling them that there is some evidence on the subject. This error of the court, however, is a very slight one. It is on a subsidiary matter not like a principle of law going to the very gist of the charge or the defense. It was error, but not reversible error. The evidence in this case shows that appellant was clearly and conclusively guilty of all that the jury found by their verdict; therefore this court should not be nice to find error upon which to reverse the judgment.

The evidence shows that appellant was a track-walker on a railroad in the steel company's plant at

Gary, Indiana; that the decedent was a watchman at a bridge over the Calumet river; that he (decedent) was stationed at the end of the bridge next to the plant to prevent persons from going over this bridge; that on the evening in question, appellant came from his work between five and six o'clock; that, instead of walking along the road where workmen were walking, he walked ten or fifteen feet from the road on the side next to this watchman; that the watchman saw him and told him to get back on the road; that thereupon a physical encounter occurred between the two; that both went into their pockets for knives; that the watchman got his knife out first and struck several blows; that one blow above appellant's eye caused blood to run down over his face; that appellant broke away from decedent; that after this first encounter, and at the time appellant broke away from the decedent, they were ten or fifteen feet apart; that a foreman, who was in an office about 300 feet away from the controversy, seeing this first combat, came out and remonstrated with appellant and decedent and told appellant to go home; that decedent paid no attention to appellant at this time, but was standing still some distance from appellant; that after this foreman had gone, or while he was going, back to his office to call someone up on the telephone, appellant kept walking towards decedent, with his right hand in his pocket, talking to the decedent and gesticulating with his left hand; that at this time decedent stood in the roadway with his hands at his side, and apparently paid no attention to appellant; that appellant kept walking towards decedent and talking; that finally he suddenly lunged at decedent and struck him a backhanded blow with his right hand; that decedent did not move while appellant was thus going towards him, nor for an instant after the blow was struck; that appellant slowly backed away after delivering this blow; that



someone in the crowd of workmen called decedent's attention to a knife sticking in his breast in the region of his heart; that thereupon decedent plucked this knife from his breast, pursued appellant, striking him in the back; that appellant kept running and escaped decedent; that decedent turned around and walked back a short distance in a zigzag manner, sank down, and died from this knife wound. All of the evidence showed that there was a very appreciable time between the first encounter and the time appellant struck the fatal blow; that decedent indicated by his conduct that he considered the encounter over, and that appellant, out of anger and in a spirit of revenge, came back and struck the fatal blow when there was no occasion for self-defense at all.

The above circumstances were testified to by several witnesses with such slight variation in details as to show truthfulness and disinterestedness. Even appellant's own testimony, when taken all together, does not sharply contradict this. True, he claims it was all one encounter, but he admits that he was away from decedent three or four or five feet at the time between the first encounter and the second, when he drew his knife and struck the fatal blow, but claims the decedent was holding him with his left hand and striking with his right. In this connection, it is important to note that the evidence shows that appellant is thirty-six years old, five feet five inches tall, and weighs from 150 to 152 pounds; that decedent was twenty-nine years old, five feet eight inches tall, and weighed about 136 pounds.

We have thus touched upon the main points in the evidence to throw light on the previous discussion of error, and also that it may be kept in view in what we shall say on another error claimed by appellant.

In the course of the cross-examination, appellant was asked: Q. "After you got loose from Mr. Spradley (decedent) what did you do?" A. "I saw myself all

full of blood and I was excited and I put my hand in my pocket and pulled out my knife and struck him."

Q. "What was he doing while you were taking out your knife?" A. "He was holding me, coming closer."

Counsel for the defendant interposed at this point, saying: "Give us everything." Whereupon this further answer was made by appellant, through the interpreter: A. "He said about three or four feet from him." Then came this question by the state: Q. "He was not holding you then, if he was three or four feet from you?" A. "He says, his arm is long enough to reach three or four feet, he says. \* \* \*" Then this question on cross-examination, through an interpreter: Q. "How far away from Spradley were you when you got your knife out?" A. "About four feet, he says, or five feet." Then this question followed immediately by the state: Q. "Did you talk to him (Spradley) when you were going up to him just before you stabbed him?" Counsel for the defendant: "I object to the question. The question assumes that he walked up to him." Court: "Answer the question, take an exception if you want it." Defendant's counsel: "The question assumes something, Judge, that is not fair." Court: "I do not think so. He testified about going forward and going away and going back." Counsel for the defendant: "I take exception to the remarks of the court and his interpretation of what the evidence was." Court: "You can take an exception."

The state contends that appellant presents no question because he did not move to withdraw the submission of the case and discharge the jury. This we need

5. not decide, for, while we hold that the remark of the court was improper and was error, it was harmless error in this case. If the evidence in this case were close on the subject of self-defense, we would have a different question; but it is far from close. As we

said before, appellant's own story taken as a whole is not sharply in conflict with the circumstances detailed by the state's witnesses. This pathway, near which this fight took place, was filled with many persons who saw this encounter. No one was produced to corroborate appellant's weak claim of self-defense. Appellant, immediately after the killing, went to one of the counsel who defended him in the trial. This counsel went with him to the prosecuting attorney and to the court and arranged for recognizance. Thus, from the very beginning, appellant had an opportunity to see and interview witnesses, and to have counsel do so for him. Under the evidence in this case, with perfect instructions and exemplary conduct every instant of the time on the part of both the court and counsel, twelve honest men of ordinary intelligence could not have found appellant guilty of a less offense than voluntary manslaughter—exactly what they did find him guilty of.

There being no reversible error in the record, the judgment of the trial court is affirmed.

NOTE.—Reported in 125 N. E. 27. See under (1) 21 Cyc 822.

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### MARCO v. STATE OF INDIANA.

[No. 23,480. Filed November 19, 1919.]

1. RECEIVING STOLEN GOODS.—*Reception from Robbers.—Larceny.*—It is no defense to a prosecution for receiving stolen goods that the article received was taken by robbers, and not in the commission of a larceny, since every robbery includes a larceny. p. 542.
2. RECEIVING STOLEN GOODS.—*Variance.*—In a prosecution for receiving stolen goods, there is no variance between an affidavit charging larceny of the article received and the evidence showing that the article was taken by robbers, since every robbery includes a larceny. p. 542.
3. RECEIVING STOLEN GOODS.—*Ownership of Goods.—Evidence.—Sufficiency.*—In a prosecution for receiving a stolen automobile

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Marco v. State—188 Ind. 540.

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under an affidavit charging the ownership to have been in a named person, evidence tending to show that two men conspired to take it from the owner and sell it, and that in the execution of their intention the owner was killed, was sufficient to support a verdict of guilty, though the owner was dead at the precise time of the taking, since, the intention having existed long before the owner's death, the jury was justified in finding that to all intents and purposes the automobile was stolen prior thereto. p. 545.

4. RECEIVING STOLEN GOODS.—*Instruction.—Certainty.*—In a prosecution for receiving a stolen automobile, an instruction that, if the jury should find that the two named persons alleged to have taken the automobile, or either of them, shot and killed the owner and, as a part of such transaction, took possession of the automobile, the taking under the circumstances constituted a larceny and that this would be true even though they intended to rob the owner of the car and not to steal it, was not erroneous as being misleading, uncertain or ambiguous. pp. 546, 547.
5. RECEIVING STOLEN GOODS.—*Instruction.—Applicability to Issues.*—In a prosecution for receiving a stolen automobile, an instruction on the subject of conspiracy, pursuant to which the defendant and another procured automobiles to be stolen for them to sell, in which instruction the jury was told that, if such conspiracy existed, the defendant would be bound by all things done and said by his coconspirator in carrying out the conspiracy, was not erroneous as being inapplicable to the issues. pp. 546, 548.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Prosecution by the State of Indiana against Hyman Marco. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Alvin Padgett* and *Hastings, Allen & Allen*, for appellant.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings*, *Dale F. Stansbury* and *A. H. Greenwood*, for the state.

HARVEY, J.—Appellant, Marco, was convicted by a jury in the Daviess Circuit Court upon an affidavit charging him with unlawfully and feloniously buying, concealing, and aiding in the concealment of one Dodge Brothers' automobile, of the value of \$700, the personal

chattel of one Andrew Manos; that appellant then and there well knew the same to have been feloniously stolen by one Chatten and one Larrison. Appellant relies here upon an alleged error of the circuit court in overruling his motion for a new trial, the first cause of which is that the verdict of the jury is contrary to law. It is not claimed that the verdict of the jury is not sustained by sufficient evidence.

In support of the proposition that the verdict is contrary to law, it is claimed by appellant that it appeared from the evidence that the automobile was taken by robbers, and not taken in the commission of a larceny thereof.

Upon this point it is sufficient to say that, even so, every robbery includes a larceny. The affidavit charges a larceny, and the material allegations thereof

1. are established, even though the transaction might also be termed a robbery. The above statement also disposes of the proposition that
2. there is a variance, in that the affidavit is not supported by the evidence, for the same reason.

It is further asserted that the evidence does not support a conviction upon this affidavit for the reason that the ownership is, by the affidavit, charged to have been in one Manos at the time the automobile was taken; whereas, the evidence shows that said Manos was dead at said time, and appellant also claims that the allegation in the affidavit that appellant knew said automobile to have been stolen at the time he is charged to have purchased, concealed and aided in the concealment thereof, is not supported by the evidence.

A statement of the facts appearing in the evidence relating to this matter will aid in the solution of the two propositions last referred to, and also in determining whether there was error in the giving of instructions Nos. 4½ and 8 by the court on its own motion.

Dewey Chatten and Virgil Larrison, who are the persons charged with having stolen the car in question, testified for the state, and it appears from their testimony, which is very strongly corroborated, that they were young men engaged in the business of stealing and disposing of automobiles. They had, within two weeks prior to the theft charged in this case, stolen two Ford automobiles, and had sold them to the defendant, Marco and one Rhodes, the witness stating that the first car was stolen in Terre Haute, driven to Washington, Indiana, and sold to Charles Rhodes; that they first negotiated with appellant for the sale of that car, and that at appellant's place of business they met said Rhodes, and that said Rhodes proposed to trade for said car, if Marco did not; that they did make a trade with said Rhodes, receiving a Marmon car and fifty dollars in cash; that they stole a second car in Terre Haute, took it to Washington, Indiana, going to defendant's house, where defendant, Marco, told them he had a car he would trade them. This was done, and they again received fifty dollars in cash; that appellant did not ask the young men where they got either of these cars; he did not say anything to them when negotiating about the first car as to whether he knew it had been stolen. After he traded for the car, he asked if they had a bill of sale for it, and was told that they did not have, but made out a bill of sale as they sat in the car in front of the defendant's place of business. At the time they were negotiating about the first car, defendant said he "knew how we got the car, and after that we went ahead." Witness further stated that he and Larrison stole a third car, a Dodge Brothers' touring car, a fully equipped car; that they got it from a Greek taxi driver named Andrew Manos, whom they met in Terre Haute; that they hired him to take them for a drive to Nine-Mile Island; that they thus traveled to a place known

as Peach Orchard, and after they had made a turn and started back, Larrison, who sat in the rear seat, started to "hold up" Manos, and just as he did that Manos shifted the gears, the car jolted, and the gun was accidentally discharged and killed the taxi driver; that thereafter the body of Manos was by the witness and Larrison buried in the creek bottom; that in the evening of the next day they had a conversation with appellant, Marco, at his residence; that Marco said the car was "too big for him to handle;" that the witness then told Marco that the driver had been "knocked out" by the other fellow, meaning Larrison; and that appellant remarked that he did not like to take any chances, that he would rather have a smaller car, but told the witness to see him the next morning; that appellant on the next morning told the witness he would give him and Larrison \$100 down and \$150 in thirty days "if nothing came up against the car;" that defendant told Chatten to go and see Rhodes and then to come back; that defendant told the witness to go up one street and he would go up another street, and they would meet in Rhodes' place of business. At Rhodes' place of business a check was written by Rhodes for \$100, and that the witness asked Rhodes for a bill, or receipt, whereupon defendant Marco, said "that would throw too much suspicion on us in case we are caught," and that their word was good. Appellant, Marco, thereupon gave to Rhodes a check for fifty dollars, at which time witness asked Marco if they were going "fifty-fifty" on the deal, and Marco laughed, and said, "Yes." The witness asked Marco and Rhodes if they wanted them to bring another automobile, and Marco said "Yes," and witness asked if it would be all right to bring one Saturday, and Marco said, "Yes," whereupon Rhodes spoke up and said that "would be too soon," but Marco said it would be all right, and either Rhodes or Marco said to "bring Fords,

as they are easier to dispose of;" that Marco had said in one of the conversations in connection with one of the earlier trades that "Ford cars were easier to get away with than big cars." Rhodes and Marco were asked if it would be all right to bring two cars, and, after a conversation between Marco and Rhodes, Marco said it would be all right, and to come after night, and to bring them to his home, and to come in without riding around through the streets of Washington; but, if they did come in the daytime, to come to his place of business.

Other witnesses testified as to the existence of the two checks above referred to, and to the fact that appellant stopped payment on the fifty-dollar check he gave to said Rhodes.

Appellant and said Rhodes denied most of the facts testified to by said Chatten, in so far as Chatten recounted transactions and conversations had with himself.

It was for the jury to weigh this testimony, and, having done so, the jury returned a verdict against appellant, and, on the point made, we cannot say that the verdict is contrary to the evidence.

Appellant asserts that, as the evidence shows Manos was dead at the time the car in controversy was taken from him, it thus appears from the evidence that

3. Manos did not at said time own the car; that it belonged to his estate. The evidence tends to show that these young men conspired to take said automobile from Manos and sell it, and in the execution of their said intention he was killed. Their intent to so take his car existed long before his death, and, if the jury was satisfied of this, the jury was justified in finding that they had to all intents and purposes stolen his car prior to his death, and that he was the owner of it



at the time it was stolen. Under these circumstances we cannot say that the jury's verdict was contrary to law.

Appellant asserts error in the giving of instruction No. 4½ and instruction No. 8 by the court of its own motion. Instruction No. 4½ is as follows:

4. "(4½) It is contended on the part of the defendant in this cause that Andrew Manos, who owned the Dodge car mentioned in the affidavit, was dead at the time Chatten and Larrison got said car, and that dead men cannot own property. It is further contended on behalf of the defendant that Chatten and Larrison, at the time they got possession of the car mentioned in the affidavit, that they intended to hold Manos up and rob him and not to commit a larceny of the car. The court instructs you that if you find from the evidence beyond a reasonable doubt, that Chatten and Larrison, or either of them, shot and killed Manos, and that at the time of such killing, and as a part of said transaction they took possession of said car, then, the court instructs you that the taking of said car, under such circumstances, was a larceny of the car by Chatten and Larrison. In regard to the contention that Chatten and Larrison intended to hold Manos up and rob him and did not intend to commit the offense of larceny, the court instructs you that it would make no difference whether Chatten and Larrison intended to rob Manos of his car or to steal it and thereby commit the offense of larceny, as every robbery necessarily includes the offense of larceny." Instruction No. 8 is as follows:

"(8) If you find from the evidence, beyond a reasonable doubt, that before the time it is charged in the affidavit that defendant received the automobile mentioned in the affidavit, from Virgil Larrison and Dewey Chatten, the defendant and Charles Rhodes entered into a conspiracy for the purpose of

prosecuting a common enterprise and that in the prosecution of such common enterprise and to carry out the object and purpose of said conspiracy, induced and procured the said Larrison and Chatten to steal automobiles and bring them to Washington to sell, or trade to the defendant or Rhodes, and that in pursuance of such conspiracy, the said Larrison and Chatten did steal automobiles and bring them to Washington and sold or traded said automobiles to the defendant or Rhodes, and that the automobile mentioned in the affidavit was one of the automobiles stolen by Larrison and Chatten and brought by them to Washington, and sold or traded the same to the defendant, then, the court instructs you that the defendant in this action would be bound by all of the things done and said by the said Rhodes in promoting and to carry into effect the objects and purposes of the said conspiracy."

Appellant's propositions in regard to these instructions are (1) that said instructions are erroneous under

any state of facts, and, therefore, this court must

4. presume that the jury was misled thereby; and, further, that when considered in connection with other instructions, these instructions tend to leave the jury in doubt and uncertainty as to the law in the case presented for their consideration; and, again, that the instructions require explanation, and limit the freedom of the jury in considering the evidence, and are ambiguous, obscure, uncertain, unintelligible, meaningless and likely to confuse; and, again, that said instructions determine the weight of the evidence and the facts which the evidence proves.

We are satisfied that neither instruction No. 4½ nor No. 8 is subject to any of said objections, even if it can be said, which we doubt, that said objections present and properly apply any of said propositions.

Appellant's additional point as to said instruction No.

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Bryan v. Mayo—188 Ind. 548.

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8 is that No. 8 is not applicable to the issues, and should not have been given.

While it is true that the issue made is not against Rhodes and appellant for conspiracy, the evidence discloses a situation making it necessary for the

5. court to determine how far the statements of Rhodes are binding upon Marco, in order that the court may determine whether to admit the statements of Rhodes as tending to show the guilt of Marco in this case; therefore it was proper for the court to state to the jury, as it did in instruction No. 8, that if they found such conspiracy to exist, the statements made and the acts done by Rhodes in carrying out such conspiracy would be binding upon appellant.

We find no error. The judgment of the trial court is affirmed.

NOTE.—Reported in 125 N. E. 34. Receiving stolen goods: what constitutes crime, 26 Am. Dec. 261; guilty knowledge, sufficiency of proof, 15 Ann. Cas. 899. See under (1-3) 34 Cyc 518, 522, 527.

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### BRYAN v. MAYO.

[No. 23,328. Filed November 19, 1919.]

1. **BROKERS.—Sale of Realty.—Parol Contract for Commissions.**  
—An alleged parol contract employing the defendant to sell real estate for the plaintiff, by the terms of which the defendant was to receive \$25,000, in addition to his salary, when \$100,000 worth had been sold, was within the statute requiring contracts for the sale of realty to be in writing (§7463 Burns 1914, Acts 1913 p. 638), even though such sum was to be paid the plaintiff for managing the defendant's sales force. p. 551.
2. **BROKERS.—Real Estate.—Commissions.—Statute.—Construction.**—Section 7463 Burns 1914, Acts 1913 p. 638, applies to all contracts by which one person agrees to find or procure a purchaser for the real estate of another in consideration of a commission or reward; and this is true even though the

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Bryan v. Mayo—188 Ind. 548.

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result is to be accomplished in conjunction with, or through the efforts of, other agents. p. 552.

From the Laporte Circuit Court; *James F. Gallaher*, Judge.

Action by Louis A. Bryan against Alphonso C. Mayo. From a judgment for the plaintiff, the defendant appeals. *Reversed.*

*Otto J. Bruce, Darrow & Rowley and Hodges & Ridgley*, for appellant.

*Frank E. Osborn, Fred C. Crumpacker and Edwin H. Friedrich*, for appellee.

LAIRY, C. J.—Appellee brought this action in the trial court to recover on an oral contract by the terms of which appellant, as alleged, agreed to pay him the sum of \$25,000, on certain conditions stipulated therein. There was a verdict and judgment in favor of appellee. On appeal several errors are assigned as cause for reversal, most of which need not be considered. As reasons for a new trial it was stated that the evidence was not sufficient to sustain the verdict, and that the court erred in refusing the request of appellant to instruct the jury, at the close of the evidence, to return a verdict in favor of appellant.

Appellant asserts that the contract on which the verdict is based is invalid because, as shown by the complaint and the evidence, it was a contract for the payment of a sum of money by him as a commission or reward to appellee for the finding or procuring by him of purchasers for real estate belonging to appellant within the meaning of §7463 Burns 1914, Acts 1913 p. 638, which provides that no such contract shall be valid unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative.

The evidence of appellee shows that he went to Gary,

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Bryan v. Mayo—188 Ind. 548.

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Indiana, to work for appellant in 1907, while appellant was in Florida with his invalid wife. He commenced working on a salary of \$100 a month, and continued to work under that arrangement until August, 1908, when he ceased to work on a salary and commenced to sell appellant's real estate on commission. When appellee commenced selling on commission it was agreed that he should receive \$100 for each lot sold by him, and that he should receive one-half of all payments made until his commission was paid. In 1911 his commission was increased by agreement to \$125 for each lot sold. In 1912 a written contract was made, in which a commission of \$150 for each lot sold was provided. Appellee continued selling appellant's lots under the terms stated until 1913, when he severed his relation with appellant.

Appellee testified that, after he had begun selling real estate on commission, he had a conversation with appellant, in which he told him that he did not think he was making enough money for what he felt he was capable of doing. According to appellee's testimony, appellant said: "I want you to stay with me. There is enough property here to make us all rich and I am well pleased with the prices you are getting, the business you are getting, and you will see when you are through with me that you will be pleased to have remained with me." Appellee then said: "Well, I would like to have some definite understanding as to what I am to get." Appellant said: "Well, I will tell you what I will do. After one hundred thousand dollars' worth of property will have been sold, you will get twenty-five thousand dollars." Appellee said: "And I will continue also with my \$100 commission per lot?" Appellant said: "Oh, certainly, certainly, this will be extra." Appellee said: "Well, if I can have the permission to raise the prices as I see fit, I will accept that offer." Appellant said: "Well that is all right, don't raise it too high."

In his testimony in chief appellee stated that the conversation just related occurred in the fall of 1909, at the house of appellant in Gary, while his invalid wife was present, but after it was shown that appellant took his wife to California in the fall of 1908, and that he remained there with her until her death in the spring of 1910, and that he was not in Gary at any time between those dates, appellee again took the witness stand and stated that he was mistaken as to the date, and that the conversation occurred in the fall of 1908. Appellant denies that any such conversation occurred at any time. Appellee testified that he had charge of the selling department, and that appellant told the other agents that appellee was taking care of the selling department, and that they would be under his dictation and direction. He also stated that he hired the agents.

It is the theory of appellee that the verbal contract set out was an agreement on the part of appellee to act as sales manager for appellant in employing other

1. agents, directing their operations, and assisting them in closing their sales, and that it was for this service that appellant agreed to pay him \$25,000 when the total sales had reached \$100,000. There was nothing stated in the conversation on which appellee relies as establishing the contract which would indicate that appellee was to act for appellant in any other capacity than that of an agent to sell real estate; but, even though the language of the conversation, when considered in the light of the other testimony relating to the character of the services which appellee was rendering at the time the conversation occurred and which he continued to render thereafter, and in the light of other statements made by appellant as shown by the evidence, should be given the construction for which appellant contends, still it would amount to nothing more than an agreement on the part of appellant

to pay appellee \$25,000 on the consideration that appellee, through his own efforts as a salesman, and by directing and assisting other agents, would find purchasers and close sales of real estate belonging to appellant amounting to \$100,000 in the aggregate.

Appellee cites and relies on the case of *Sherman v. Clear View Orchard Co.* (1915), 74 Ore. 240, 145 Pac. 264, as sustaining his theory. Under the facts of that case appellee agreed to organize agencies in different cities, and to dispose of orchard tracts owned by appellant through such agencies, and to receive as compensation five per cent. of the aggregate sales. The contract rested in parol, and the appellant invoked the application of a statute similar to the section of our statute heretofore cited. The court held that the statute did not apply to the contract shown by the evidence. This court has a high regard for the decisions of the courts of last resort in other states; but after a thoughtful consideration of the case cited it is unable to adopt the conclusion reached by the Oregon court as to the applicability of the statute to a case of this kind. The authorities cited to sustain the conclusion do not bear directly on the question involved, and the reasons adduced in support of it do not appear to be very cogent.

No other decisions directly in point have been cited, and the research of the court has failed to disclose any such authorities. There are some cases bearing indirectly on the question which seem to support the conclusion reached in this opinion. *Stout v. Humphrey* (1903), 69 N. J. Law 436, 55 Atl. 281; *Dolan v. O'Toole* (1900), 129 Cal. 488, 62 Pac. 92.

The statute under consideration is one of a number of statutes to prevent frauds and perjuries; and, like other similar statutes, it was intended to prevent

2. the perpetration of frauds by perjured testimony to support alleged parol contracts in certain

cases. The statute under consideration applies to all contracts by which one person agrees to find or procure a purchaser for the real estate of another in consideration of a commission or reward. The contract disclosed by the evidence is clearly within the provisions of the statute. Before appellee could assert any right to receive payment of the sum stipulated in the contract, even though it were in writing, it would have been incumbent on him to find purchasers and close sales for real estate of appellant amounting in the aggregate to the sum stipulated. This result was to be accomplished through his efforts in conjunction with the efforts of other agents under his dictation and control. The payment of his compensation or reward depended on the attainment of the result stated, and it could not be earned in any other way. The contract falls within the meaning and intent of the statute providing that such contracts shall be invalid if not in writing, and this is true even though it be given the construction most favorable to appellee's contention.

The court should have directed the jury at the conclusion of the evidence to return a verdict in favor of the defendant.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 124 N. E. 873. Sale of real estate: commission, necessity for written contract, 44 L. R. A. 601, 9 L. R. A. (N. S.) 933, 13 Ann. Cas. 977, Ann. Cas. 1915A 1133. See under (1, 2) 9 C. J. 558, 600.



## SOURBIER ET AL. v. BROWN.

[No. 23,249. Filed June 25, 1919. Rehearing denied November 20, 1919.]

1. **LIBEL AND SLANDER.—Publication.**—The actionable wrong in libel is the publication of the false and defamatory writing. p. 558.
2. **LIBEL AND SLANDER.—Joint and Several Liability.**—The writer and a person making publication of a libel are jointly and severally liable. p. 559.
3. **LIBEL AND SLANDER.—“Primary Publication.”—Mailing.**—The sending of a libelous circular letter by mail constitutes a primary or original publication thereof as to persons reading the letter. p. 559.
4. **LIBEL AND SLANDER.—“Secondary Publication.”**—The exhibiting or remailing of a libelous letter by a person receiving it constitutes a secondary publication. p. 559.
5. **LIBEL AND SLANDER.—Joint Actions.**—A joint action cannot be maintained against the maker of a secondary publication and the makers of the primary publication for the recovery of all damages resulting from the primary publication. p. 559.
6. **LIBEL AND SLANDER.—Secondary Publication.—Liability.**—The maker of a secondary publication of libelous matter is liable for the consequences thereof, but he is not responsible for a primary publication in which he did not participate. p. 559.
7. **LIBEL AND SLANDER.—Copying Primary Publication.—Liability.**—A person who copies primary libelous matter and publishes or otherwise distributes copies thereof is guilty of publishing a new and distinct libel for the consequences of which he is responsible to the exclusion of the makers of the primary publication. p. 560.
8. **TRIAL.—Verdict.—Special Interrogatories.**—Answers to special interrogatories cannot prevail against the general verdict unless they clearly find facts that cannot be reconciled with the general verdict. p. 560.
9. **LIBEL AND SLANDER.—Verdict.—Special Interrogatories.**—In a libel action against two defendants as joint tort-feasors, in which a joint verdict and a joint judgment were rendered, an answer to a special interrogatory negating a charge of conspiracy on the part of one of the defendants as to the publication of the libelous matter was not in conflict with the general verdict which did not rest solely on the charge of conspiracy contained in the complaint, there being other allegations that such defendant composed the libelous matter, procured it to

be published and participated in the publication, the proof of any one of which would render him jointly liable with another participating therein. p. 561.

10. **LIBEL AND SLANDER.**—*Verdict.*—*Special Interrogatories.*—*Conflict.*—In a libel action against two defendants jointly, in which a joint verdict and a joint judgment were rendered, an answer to a special interrogatory finding that one of the defendants either composed the letter or caused it to be published, it not showing which of the two acts he did, is not in conflict with the general verdict, as the court on appeal will regard the general verdict as finding that such defendant did both of such acts as charged in the complaint. p. 561.
11. **TRIAL.**—*Verdict.*—*Special Interrogatories.*—*Presumptions.*—Where an answer to an interrogatory, when considered in connection with the interrogatory to which it is responsive and with other interrogatories and answers relating to the same subject, is not doubtful and uncertain, but is susceptible of a reasonable meaning consistent with the general verdict, it is the duty of the court to uphold the general verdict, since all presumptions are indulged in its favor. p. 562.
12. **APPEAL.**—*Sufficiency of Evidence.*—*Answers to Interrogatories.*—In determining whether the evidence is sufficient to support the verdict, answers to interrogatories will be accepted as establishing facts so found, unless there is a total want of evidence to sustain it. p. 565.
13. **LIBEL AND SLANDER.**—*Evidence.*—*Sufficiency.*—In an action for libel, evidence that the defendant told witnesses before the publication of the alleged libelous matter that such matter would appear concerning the plaintiff and the testimony of the plaintiff that such defendant had said to him, "Oh I will show you up good and proper \* \* \*. I will show up your consistency," with other similar evidence, is held sufficient to sustain the verdict that such defendant composed the libelous matter and caused it to be published. p. 566.
14. **TORTS.**—*Joint Liability.*—A person is not liable as a joint tort-feasor unless he participated in the wrongful act which caused the injury. p. 567.
15. **LIBEL AND SLANDER.**—*Joint Liability.*—In an action for libel against two defendants, a showing that both participated in the unlawful act is sufficient to create joint liability, it being unnecessary that they acted with a common motive or design. p. 568.
16. **TRIAL.**—*Instructions.*—*Necessity of Requests.*—In a libel action against two defendants, an instruction that, if either defendant participated in the publication of the libel, to find against such person or persons so participating, was not

erroneous for failing to distinguish between primary and secondary publication, where the defendant objecting claimed he was liable only for republication, but tendered no instruction on that theory. p. 568.

17. **LIBEL AND SLANDER.—Instructions.—Necessity of Requests.**

—In an action for libel, where one of two defendants claimed he was liable only for a secondary, and not a primary, publication of the libel, an instruction that, if such secondary publication was established, then both defendants were liable, is incomplete, but not erroneous in the absence of a tender of a complete instruction on the subject by the party objecting. p. 569.

18. **LIBEL AND SLANDER.—Instructions.—Reversible Error.**

Where one of two defendants claimed he was liable only for secondary, and not a primary, publication of a libel, an instruction authorizing only one basis for estimating damages, which was applicable only to a verdict for a primary publication, was erroneous, where another instruction authorized a verdict for the plaintiff based on a secondary publication alone, since the jury must have understood that the damages to be awarded against such defendant for participation in the secondary publication should rest on the same basis as though he had participated in the primary publication. p. 570.

19. **APPEAL.—Failure to File Briefs.—Dismissal.**—Where an appellant filed no briefs in support of his assignments of error, the appeal will be dismissed. p. 572.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by *George W. Brown* against *Edward G. Sourbier* and *William Hansman*. From a judgment for plaintiff, the defendants appeal. *Reversed*.

*Frank C. Groninger, Taylor E. Groninger, Ella M. Groninger, Michael A. Ryan, John C. Ruckelshaus, Russell J. Ryan, Joseph B. Kealing and Martin M. Hugg*, for appellants.

*Charles T. Hanna, Thomas A. Daily, Otis E. Gulley and Edgar M. Blessing*, for appellee.

**LAIRY, C. J.**—This is an appeal from a judgment for \$25,000 rendered in an action brought by appellee against appellant *Edward G. Sourbier* and *William*

Hansman. The complaint is based on a certain circular letter set out in the complaint and alleged to be false, defamatory and libelous. The complaint charges that Sourbier and his codefendant, Hansman, and each of them, conspired together and with their coconspirators for the purpose of defeating appellee as a candidate for election to the office of treasurer of Marion county, at the election of 1914, for which office appellant Sourbier was one of the opposing candidates, and to blacken and destroy appellee's good reputation in the city of Indianapolis and Marion county, and to expose him to public disgrace, ridicule, hatred and contempt. To that end, it is alleged, the appellant Sourbier and his codefendant, Hansman, and each of them, did compose, print and publish the circular letter set out in the complaint. The complaint further alleges that there were at the time of such publication 72,388 registered voters in Marion county, and that appellant Sourbier and his codefendant, Hansman, and their coconspirators planned to place a copy of said circular letter in the hands of every voter just prior to the election, and to that end Hansman, who owned a printing establishment, printed 100,000 copies of said circular letter for a consideration paid him by appellant Sourbier, and that Sourbier and his codefendant, Hansman, and each of them and their coconspirators and agents mailed and caused to be mailed and delivered by United States mail a copy of said circular letter to each and every registered voter in Marion county on the Saturday and Sunday immediately preceding the general election of 1914.

Enough of the substance of the complaint is set out to indicate how the questions presented and later discussed arise. The verdict returned by the jury was against both defendants jointly, and the judgment followed the verdict.

Appellant Sourbier asserts that the facts disclosed

at the trial show that the original publication consisted in mailing, circulating, and otherwise distributing the circular letters to the voters of Marion county, and that he did not in any way advise or procure that publication to be made, and that he did not in any way act or participate in the making of that publication either directly or indirectly, and that he had nothing to do with composing or printing the circular letter or causing it to be published in the first instance. He admits that he had two copies of the letter in his possession, one of which was handed to him on the street, and the other of which he received through the mail; and he further admits that he showed one of the copies in his possession to certain of his friends and acquaintances. Under this state of facts, which appellant claims to be disclosed by the record beyond controversy, he takes the position that he is not liable under the law for any damage caused by the original publication either jointly with his codefendant or severally. His position is that he could be held answerable under the law only for the damages occasioned by the publication which he made or participated in making, and that under the rule so stated he could be held liable for the damage only which resulted from the new publication or republication of the circular in his possession by him in exhibiting it to certain of his friends. He concedes that, as to any damage resulting from the republication made by him, the law makes him liable either individually or jointly with the original publisher at the option of the injured party.

The court is of the opinion that the position of appellant is correct as to the law when applied to a state of facts such as he claims to exist in this case.

The actionable wrong in libel is the publication of the false and defamatory writing. A person who composes and reduces to writing a libelous article against

1. another does not thereby commit an actionable

wrong, so long as he does not publish it or permit it to come into the hands of others; but if he

2. publishes it, or if another gets possession of it, either with or without his consent, a publication by such other person makes the original composer and writer liable for all damages occasioned by the publication. The writer and the person making the publication are both jointly and severally liable in such a case. Townshend, Slander and Libel, §§115, 116; Odgers, Libel and Slander 257; *Miller v. Butler* (1850), 60 Mass. (6 Cush.) 71; *Indianapolis Sun Co. v. Horrell* (1876), 53 Ind. 527.

The sending of a libelous circular letter by mail constitutes a publication of the libelous matter therein contained to every person who reads such letters.

3. This may be termed the original or primary publication. If a person who receives one of such letters exhibits it to another or remails it, either  
4. of such acts would constitute a republication of the libelous matter to all who learn its contents as a result of the exhibition or remailing. This may be termed a secondary publication. The person injured may sue all who participate in making the original publication either jointly or severally and recover for all resulting damages. *Belo v. Fuller* (1892), 84 Tex. 450, 19 S. W. 616, 31 Am. St. 75.

He cannot maintain a joint action, however, against the maker of a secondary publication and those responsible for the primary publication for the recovery

5. of all damages resulting from the primary publication. *Union Associated Press v. Heath* (1900), 49 App. Div. 247, 63 N. Y. Supp. 96.

The maker of a secondary publication is liable for the consequences of the publication which he makes or participates in making, but he cannot be held respon-

6. sible for the results of the primary publication

unless it is shown that he also made that or participated in making it. By the term "secondary publication," as here used, is meant a republication by exhibiting, remailing or otherwise disseminating the original written or printed article. It does not include the dissemination of copies of the original libelous article. A person who copies the original libelous article and publishes or otherwise disseminates the copies is guilty of publishing a new and distinct libel for the consequences of which he is responsible to the exclusion of those who made the primary publication. Thus the publisher of a newspaper containing a libelous article cannot be held for damages occasioned by other newspapers copying and publishing the article. *Hays v. Perkins* (1899), 22 Tex. Civ. App. 198, 54 S. W. 1071; *Saunders v. Mills* (1829), 6 Bing. 213; *Palmer v. N. Y. News Pub. Co.* (1898), 31 App. Div. 210, 52 N. Y. Supp. 540.

As stated, the complaint seeks to recover damages against both defendants jointly and severally resulting from the primary publication of the circular letter. The case was tried on that theory and resulted in a joint verdict and a joint judgment. Appellant asserts that the answers to the interrogatories show affirmatively that appellant Sourbier had no part in the making of the primary publication. If appellant is correct in this statement, the general verdict cannot stand as against the interrogatories; but, such answers cannot prevail against the general verdict unless they clearly and unequivocally find a fact or facts which cannot be reconciled with the verdict rendered.

In determining whether the answers to the interrogatories are in conflict with the general verdict, the court can consider only the issues, the general verdict and the interrogatories and answers thereto. In passing on the question thus presented the court regards the general

verdict as deciding every issue of fact in favor of the prevailing party, and, so regarded, the general verdict amounts to a finding in favor of the prevailing party of every fact essential to sustain and uphold the verdict and a finding against the losing party on every fact necessary to constitute an affirmative defense. Unless the answers to interrogatories clearly and unequivocally find against the prevailing party as to a fact or facts which are indispensably necessary to sustain his right to recover, or find a fact or facts in favor of the losing party which are sufficient to constitute a defense, the general verdict must stand as against the assault made by the motion for judgment on the interrogatories.

Appellant Sourbier was sued as a joint tort-feasor with William Hansman. A verdict was returned against both defendants jointly, and a joint judgment was rendered. Appellant Sourbier asserts that facts are found by answers to the interrogatories which show clearly and unequivocally that he was not a joint tort-feasor with his codefendant either in composing or printing the alleged libelous letter or in making the original publication of such letter, and that he did not conspire with his codefendant to print and publish such letter as alleged in the complaint. Appellant does not claim that the answers to the interrogatories are otherwise in conflict with the general verdict.

Interrogatory No. 4 finds that appellant Sourbier did not at any time advise, counsel or conspire with his codefendant to publish any libel against appellee.

9. This finding negatives the charge of conspiracy contained in the complaint; and if the verdict rested solely on that charge it could not stand.
10. The verdict, however, does not rest solely on that charge. If appellant Sourbier composed the letter or procured it to be printed or actively participated



in its original publication, he would be a joint tort-feasor with the others who participated in bringing about the original publication of the letter, and would be jointly liable with them for all damages resulting from such publication. Interrogatory No. 5 is double and is also in the alternative. It finds that appellant Sourbier either composed the letter or that he caused it to be published, but the court cannot determine from the interrogatory and answer which of the two acts he did. In passing on the question under consideration the court regards the general verdict as finding that he did both of such acts as charged in the complaint. It thus appears that this interrogatory is not in conflict with the general verdict. It is not required to aid it and it does not in any manner conflict with it. This interrogatory is therefore without force or effect and cannot be considered.

The other answers relied on as being in conflict with the general verdict find that appellant Sourbier and his codefendant were not acquainted prior to the election of 1914; that Sourbier did not at any time have in his possession more than two of the circular letters concerning appellee; that he exhibited the circular received by him to certain of his friends and acquaintances; that when he exhibited such letter, he did not know or vouch for the truthfulness of the statements contained therein; and that he never did more than exhibit such circular to certain friends and acquaintances. The facts that appellant Sourbier did not know his codefendant, who is charged with printing the circular letter, prior to the time of its publication, and that he did not advise, counsel, or conspire with him to publish or circulate it, do not negative the facts that he composed it and caused it to be originally published and circulated as charged in the complaint and as found by the general verdict. If he did either, or if he actively

participated with his codefendant in either, he was a joint tort-feasor with respect to the original publication. It is asserted that the answer to interrogatory No. 14, in which the jury found that appellant Sourbier did no more than exhibit the circular letter received by him to certain friends and acquaintances, negatives the fact that he had done, or participated in doing, anything with reference to composing it or procuring it to be printed or published in the first instance. If the answer taken in connection with the interrogatory to which it is addressed and the other interrogatories on the same subject, conveys the meaning ascribed to it by appellant with such clearness and certainty as to preclude any other meaning consistent with the general verdict, the court would be required to adopt that meaning and give effect to it in deciding the question presented. Given that meaning, the answer under consideration would amount to a finding that appellant Sourbier did not compose the alleged libelous letter, and that he did not cause it to be printed, and that he did not in any way participate in the original publication of the article. The effect of such a finding would be to overthrow the general verdict which is based on the joint tortious acts of appellant and his codefendant in making the original publication of the circular letter. On the other hand, if the answer, when considered in connection with the interrogatory to which it is responsive and with the interrogatories and answers relating to the same subject, is doubtful and uncertain in its meaning, and if it is susceptible of a reasonable meaning consistent with the general verdict, it is the duty of the court to adopt such meaning and uphold the general verdict. All presumptions are indulged in favor of the general verdict. *Lavene v. Friedrichs* (1917), 186 Ind. 333, 115 N. E. 324, 116 N. E. 421.

The answer to interrogatory No. 7 finds that appel-

lant Sourbier never had more than two of the circular letters in his possession. By the answer to interrogatory No. 12 the jury finds that he exhibited the circular letter received by him to certain of his friends. The answer to interrogatory No. 13 finds that at such time he did not know or vouch for the truthfulness of the statements contained therein, and the answer to interrogatory No. 14 finds that he never did more than exhibit such circular to certain friends. These interrogatories were directed to the conduct of appellant Sourbier in connection with the particular copies of the circular letter in his possession and the exhibition of such letter to certain of his friends. By the thirteenth interrogatory the attention of the jury was directed to his conduct at the time he exhibited those letters to friends, and, in response to the question therein contained, it answered that he did not know or vouch for the truth of the statements contained in the letter. In answer to the interrogatory next following the jury stated that he never did more than exhibit such circular letter to certain friends. When the answer to interrogatory No. 14 is considered in connection with the interrogatory and the answer immediately preceding it and the other interrogatories and answers relating to the same subject, its meaning and application are open to great doubt and uncertainty. The jury may have understood that interrogatory No. 14 had reference to the conduct of Sourbier in connection with the particular copy of the letter in his possession and as to what he said and did at the time he exhibited it to friends. It had stated in answer to the previous question that he did not vouch for the truthfulness of the statements, and in its answer to the fourteenth interrogatory the jury may have meant that he did not comment on the statements and that he made no use of the circular in his possession other than to exhibit it to certain friends. The attention of the

jury was not directed to his conduct at the time and in connection with the original publication, and the answer probably had no reference thereto, but most likely was confined to his conduct with reference to the circular letter in his possession. The meaning of the answer is at least doubtful and uncertain, and all such doubts must be resolved in favor of the general verdict.

The general verdict finds that appellant Sourbier composed the circular letter, procured it to be printed, and participated in the original publication. If the jury meant for their answer to have the limited application indicated it does not conflict with the general verdict. So construed the interrogatories do not directly and affirmatively show that appellant was not a joint tort-feasor with his codefendant in making the original publication. Appellant's motion for judgment in his favor on the interrogatories was properly overruled.

Appellant Sourbier also assigns as error the action of the trial court in overruling his motion for a new trial. Under this head several questions are presented arising under different causes assigned.

The first question thus presented challenges the sufficiency of the evidence to sustain the verdict. In presenting this question appellant's counsel start out

12. with the statement that the answers to the interrogatories show clearly and positively that appellant Sourbier did not participate in and that he had nothing to do with the making of the primary publication of the circular letter. It is settled by the decisions of this state that the courts, in determining whether the evidence is sufficient to sustain the verdict, will consider any facts properly found by answers to interrogatories. The material facts directly and positively found by the answers to the interrogatories will be regarded by the court as established by evidence even though there may be a conflict in the evidence as to the fact or facts so

found. The jury having considered and weighed the evidence as to such facts and having based its answer thereon, the court will accept every fact so found as true, unless there is a total want of evidence to sustain it. *Evansville, etc., Traction Co. v. Spiegel* (1911), 49 Ind. App. 412, 422, 94 N. E. 718, 97 N. E. 949; *Barr v. Sumner* (1915), 183 Ind. 402, 411, 107 N. E. 675, 109 N. E. 193.

While the rule as stated may be regarded as settled, it cannot avail appellant in this case. The answers to the interrogatories on which appellant relies do not show directly, positively and unequivocally that he did not participate and take part in making the primary publication. The general verdict finds that he composed the letter, and that he caused it to be printed and published, and the finding so made must stand unless there is a total failure of evidence to sustain it.

While there is no direct evidence showing that appellant Sourbier composed the circular letter or that he procured it to be printed and circulated as charged

13. in the complaint, there is ample evidence from which the jury could justly and reasonably infer that he did, or participated in the doing of, all of the acts so charged. It is shown that prior to the time the letter came out he held a conversation with a minister who testified as a witness at the trial in which he referred to appellee's candidacy and mentioned most of the charges which were embodied in the circular letter when issued, stating that such charges were being circulated and predicting that those things would all come out about Mr. Brown before the election. Other witnesses testified to similar statements made by appellant, and appellee testified to a conversation with appellant Sourbier at a time before the circular letter was made public in which Sourbier said, "Oh I will show you up good and proper before the campaign is over. I will

show up your consistency." From the evidence to which reference has been made, and other evidence of a like nature to be found in the record, the jury was justified in drawing the inference that appellant Sourbier composed the circular letter and caused it to be printed and circulated.

To sustain his contention that the verdict is contrary to law, appellant relies on the answers to the interrogatories as showing a state of facts on which no verdict could be legally based fixing a liability on appellant Sourbier jointly with his codefendant. For the reasons heretofore stated this position cannot be sustained.

Other errors presented under the motion for a new trial relate to the giving of certain instructions and the refusal to give each of the instructions tendered by appellant Sourbier. By each of the instructions tendered the court was requested to charge the jury that it would not be warranted in finding the defendants jointly liable unless the preponderance of the evidence showed that they acted in concert or unity in carrying out a common design or purpose to print or publish the alleged libelous circular.

It is true that a person cannot be held liable as a joint tort-feasor with others unless it appears that he participated in the wrongful act which occasioned the

14. injury. Two persons who commit two separate wrongful acts, which result in injury to the same person, cannot be held jointly liable for the damages resulting from such wrongful acts. *West Muncie Strawboard Co. v. Slack* (1904), 164 Ind. 21, 24, 72 N. E. 879; *Illinois, etc., R. Co. v. Hawkins* (1917), 66 Ind. App. —, 115 N. E. 613.

Where two or more persons at different times and places deposit rubbish and filth in a stream, the result of which is to befoul the water, they cannot be held jointly liable for the resulting damage. *Martinowsky*

v. *City of Hannibal* (1889), 35 Mo. App. 70; *Miller v. Highland Ditch Co.* (1891), 87 Cal. 430, 25 Pac. 550, 22 Am. St. 254; *Willard v. Red Bank Oil Co.* (1909), 151 Ill. App. 433; *Chipman v. Palmer* (1879), 77 N. Y. 51, 33 Am. Rep. 566.

While it is true that the jury would not have been warranted in holding Sourbier jointly liable with his codefendant for the damages resulting from the

15. primary publication of the circular unless it found that he took some part in composing it or causing it to be printed or that he participated in making the original publication or causing it to be made, still, if the jury so found, it was not necessary that it should further find that he and his codefendant acted from a common motive or with a common design or purpose. It is sufficient to create a joint liability if it is found that they both participated in the commission of the same unlawful act. Cooley, Torts (3d ed.) 247; *City of Valparaiso v. Moffitt* (1895), 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. 522.

Instruction No. 5 given by the court, after stating the facts which must be established to show a liability against one or both of the defendants, concludes

16. as follows: "And in the event you find that one or both of the defendants herein participated in the publication of such statement, then your verdict should be for the plaintiff against such person or persons as a fair preponderance of the evidence showed had participated in such publication." Appellant finds no fault with the first part of the instruction; but he does object to the part quoted for the reason that the instruction does not define "participate" as used therein, or limit its application in such a way as to show that it referred to a participation in the original, or primary, publication of the libel, and not to a republication of the circular letter by exhibiting those which he received

to certain of his friends. Under the law as stated in the former part of this opinion appellant was clearly entitled to an instruction limiting his liability to such damages only as resulted from his republication of the circular letters in his possession, in case the jury failed to find from the evidence that he composed the circular letter or caused it to be printed or that he took some part in causing its primary publication to be made. No instruction was tendered on behalf of appellant by which the court was requested to direct the attention of the jury to the original publication as distinguished from the secondary publication admittedly made by appellant Sourbier. If the case was tried below on the same theory on which it is presented in this court, it is rather remarkable that such a request was not made. It is true that the instruction does not state the law applicable to the evidence as fully as appellant was entitled to have it stated, but it states the law correctly so far as it goes. If appellant desired to have the jury more fully instructed, or if he desired to have his theory of the case presented in a more favorable light, it was his duty to tender proper instructions and request the court to give them. Appellant cannot complain because the jury was not more fully instructed.

The portion of the seventh instruction of which appellant complains reads as follows: "If you find from the evidence in this case that the defendant Hansman

17. printed the statement as alleged in the complaint with the reasonable expectation that it would be read by some third person, and suffered the same to come into the hands of the defendant Sourbier, and the same did come into the hands of the defendant Sourbier, and he, the said Sourbier, read a copy of the same and exhibited the same to various third persons so that they could see, and did see, the contents of such printed statement, and that the same tended to bring plaintiff into



disrepute and to degrade and disgrace him, or to expose him to ridicule and contempt, and as a result thereof plaintiff suffered damages, then both of the defendants would be liable to the plaintiff and if you so find your verdict should be for the plaintiff and against both of the defendants—unless you further find that the statements set forth in such printed statement were true.” This part of the instruction is directed to liability arising from the secondary publication admittedly made by appellant Sourbier. By this instruction the jury was told, in effect, that such secondary publication rendered both of the defendants liable and authorized a verdict in favor of the plaintiff against both of the defendants. There can be no doubt that, under the facts stated, there would be a liability against appellant Sourbier for the damages resulting from the secondary publication made by him. The instruction, however, does not limit the damages that could be recovered under the facts stated therein to such only as were occasioned by the secondary publication. In this respect it may be said to be incomplete but not erroneous; and as appellant requested no instruction stating the law more fully or placing a proper limitation on the damages recoverable under such state of facts, he is not in a position to complain.

By the seventeenth instruction the court instructed the jury that, if from the evidence and the instructions of the court it found for the plaintiff, it was

18. required to assess the amount of damages to be recovered, and to render its verdict accordingly.

The court then proceeded to state what elements of damages the jury might properly consider in arriving at the amount to be awarded. By this instruction the jury was authorized in making its award of damages to consider the injurious consequences produced by the entire circulation and publication given to the circular letter as shown by the evidence. This instruction was

correct if the jury found from the evidence and under the instructions that appellant Sourbier participated in any way in the making of the primary publication; but if it failed to so find, and, in obedience to the seventh instruction, based its verdict on the secondary publication admittedly made by Sourbier, then the instruction on the subject of damages was erroneous. It is thus seen that the jury was authorized by the instructions to find a verdict against appellant Sourbier and his co-defendant on either of the two theories. If the verdict rested on the theory that appellant Sourbier participated in making the primary publication or causing it to be made, the damages should be based on the injuries resulting to appellee in consequence of the publicity given to the circular by that publication; but if the verdict rested on the theory that he made or participated in making the secondary publication only, the damages would be properly based on the injury resulting to appellee as a consequence of the publication which appellant made or participated in making. By the seventeenth instruction only one basis for estimating damages was given to the jury, and that was applicable only to a verdict based on the primary publication. By this instruction the jury was authorized to fix its damages on the same basis in case its verdict rested on the liability of the defendant for making the secondary publication only. In considering the seventeenth instruction in connection with the other instructions given, the jury must have understood that the damages to be awarded against the defendant, in case he participated in the secondary publication only, should rest on the same basis and should be in the same amount as though he had participated in making the original publication. This instruction is not incomplete, but it is erroneous. By the seventh instruction the court stated to the jury the facts which it was required to find in order to justify

a verdict based on the secondary publication only, and by this instruction authorized the jury to find such a verdict if the facts so stated were proved. If the court had given no instruction which authorized a verdict on that theory, it is possible that no error would have been presented in the absence of a request for proper instructions presenting that theory; but, as the instructions expressly authorize a verdict on that theory, and the instruction given on the subject of damages is erroneous as applied to that theory, the latter instruction must be held to be erroneous.

Such an instruction as applied to the evidence in this case was clearly prejudicial. The defendant Sourbier admitted that he had made the secondary publication, and, under the seventh instruction, he was clearly liable unless the charges contained in the circular letter were found to be true. He denied that he had any connection with making the primary publication, and an issue of fact was thus presented on which the evidence was conflicting. There was no direct evidence showing that he participated in making the primary publication or in causing it to be made, but circumstances were shown from which such participation could be reasonably inferred. The verdict finds against the defendant on the theory that he was responsible for one or the other of such publications, and the court has no means of knowing on which of such publications the verdict rests. The motion of appellant Sourbier for a new trial should have been sustained.

The defendant Hansman filed assignments of error on the transcript, but filed no brief in support of such assignments. For failure to file a brief in sup-

19. port of his assignments of error as provided by the rules of this court, the appeal as to Hansman is ordered dismissed.

The judgment is reversed as to appellant Sourbier,

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Public Service Commission v. Frazee—188 Ind. 573.

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with instructions to the trial court to sustain his motion for a new trial.

The death of appellee, George W. Brown, since the submission of the appeal having been suggested to the court, it is ordered that this judgment be, and the same is hereby, rendered as of the date of submission of this cause.

NOTE.—Reported in 123 N. E. 802. See under (1-4) 25 Cyc 365-370, 427; (5) 25 Cyc 434; (6) 25 Cyc 430; (7) 25 Cyc 367.

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PUBLIC SERVICE COMMISSION v. FRAZEE.

[No. 23,344. Filed March 4, 1919. Rehearing denied November 20, 1919.]

1. APPEAL.—*Rulings on Evidence.—Review.*—Where the appellant's discussion of the rulings of the court relating to the evidence is general, the court on appeal is justified in so treating the rulings. p. 575.
2. TELEGRAPHS AND TELEPHONES.—*Reasonableness of Rates.—Admissibility of Evidence.—Appeal from Public Service Commission.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, it was proper to hear evidence of operating expenses at a time subsequent to the order of the commission, in view of §10052c3 Burns 1914, Acts 1913 p. 167, §81, which authorizes the hearing of different or additional evidence by the court and provides for the transmission thereof to the commission. p. 575.
3. PUBLIC SERVICE COMMISSION.—*Reasonableness of Rates.—Evidence.—Admissibility on Appeal.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, where the question of the reasonableness of such order has not been clearly solved, evidence as to a practical test of the reasonableness thereof is admissible. p. 576.
4. EVIDENCE.—*Expert Opinion.—Telephone Rates.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, testimony of an expert accountant who was experienced in telephone matters as to whether the cost of operating telephone plants within the last few years had increased, taking the telephone station as a unit, was admissible. p. 576.

5. EVIDENCE.—*Reasonableness of Rates.—Expert Opinion.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, testimony of an expert accountant experienced in telephone matters that it was not good business to allow a discount of ten to fifteen cents per month on rentals not paid in advance was admissible. p. 576.
6. EVIDENCE.—*Reasonableness of Rates.—Expert Opinion.*—On appeal to the circuit court from an order of the Public Service Commission fixing rates, testimony of an expert accountant experienced in telephone matters that eight per cent. was a reasonable return on the investment was admissible, since the risk involved depends upon the circumstances surrounding the investment and can be known only by one having such experience or technical knowledge as enables him to form an opinion on the subject, after having considered the interests of all concerned. p. 577.
7. PUBLIC SERVICE COMMISSION.—*Appeal.—Expenses.—Determination.*—Where in a hearing as to reasonableness of rates of a telephone company, the Public Service Commission found against the company, an order of the commission that the company pay the costs of the hearing was not a ruling on an issue tried, but was in the nature of a judgment for costs, which was properly made against the company on entry of the order, under §10052v2 Burns 1914, Acts 1913 p. 167, §74; hence, on appeal to the circuit court, a judgment setting aside the commission's order was sufficient also to set aside its order for costs, necessitating the repayment to the company of an amount improperly collected therefor. p. 578.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action on appeal to the circuit court by Lewis A. Frazee from an order of the Public Service Commission. From a judgment setting aside the order of the commission, the commission appeals. Trial court directed to modify conclusions of law; otherwise *Affirmed*.

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings*, *U. S. Lesh*, *Edward M. White* and *Dale F. Stansbury*, for appellant.

*Miller & Dowling*, for appellee.

HARVEY, C. J.—The Public Service Commission, after a hearing, found against appellee, doing business as the

Connersville Telephone Company; and made an order fixing certain rates, rules and regulations for the future conduct of appellee. Appellee, by action in the circuit court, appealed from said order, alleging, in short, that said rates, rules and regulations so fixed were unreasonable, unlawful and confiscatory. From a decision of the circuit court sustaining such allegations this appeal is prosecuted by the commission. The only propositions relied upon by appellant here relate to the admission of evidence, and to the action of the circuit court in rendering judgment for the recovery by appellee here of \$521.41, paid into the state treasury upon the order of the commission; same being the expense of the commission in the hearing. Appellant's discussion of the rulings of the court relating to evidence is quite

1. general; and we are justified in so treating the rulings. For instance, appellant complains of the admission of evidence of operating expenses at a time subsequent to the decision of the commission.

The statute, §10052c3 Burns 1914, Acts 1913 p. 167, §81, provides that the court may hear evidence "different" from, and "additional" to, that heard by the

2. commission; and the statute does not provide that such different and additional evidence shall relate only to matters occurring or existing prior to the hearing or decision of the commission; therefore, so far as expression in the statute is concerned, such evidence may relate to matters occurring after the board's decision and up to the time of trial in the circuit court. The statute further provides that if the trial court hears "additional" or "different" evidence, the trial court shall, before rendering judgment, transmit a copy of the "additional" or "different" evidence to the commission for its consideration; and that the commission may alter or rescind its order, and must report to the court within ten days. Thus the commission is placed upon

the same footing, so far as evidence is concerned, as is the circuit court on appeal; and the fact that the evidence may relate to after matters is unobjectionable.

Furthermore, the propriety of hearing evidence as to a practical test of the reasonableness of such order, especially where that question is not clearly solved

3. by a hearing before the commission, is recognized by the courts. *Willcox v. Consolidated Gas Co.* (1908), 212 U. S. 19, 54, 55, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; *North-ern Pacific R. Co. v. N. Dakota* (1909), 216 U. S. 579, 581, 30 Sup. Ct. 423, 54 L. Ed. 624. This clearly shows that it is proper to hear evidence of things happening after such an order is entered to properly determine whether such order is valid or invalid. This disposes of all objections made to the admission of such evidence.

The remaining objections to evidence are almost entirely directed against permitting witnesses to state opinions regarding various phases of the telephone business.

Appellant chooses from among many such, and as illustrating its position, its objection to the question, in substance, whether in the last few years the cost of operating telephone plants in Indiana has increased per unit, taking the telephone station as a unit.

The court found the witness to be an expert accountant of sufficient experience in telephone matters to understand the same. If it were proper for the

4. court to look only to the experience of other individual telephone companies and make comparisons, it might appear that the cost of operating  
5. one plant had increased because of bad management; and it might thus appear that the cost in another case had decreased by extraordinarily careful management; and such comparison would little aid the court. On the other hand, general and wide knowledge

of such matters by one accustomed to study such accounts and make observations of all things affecting results in such business is largely technical, and is not possessed by persons ordinarily informed, nor as fully by those engaged in operating only one such plant, and upon such matters the opinion of an expert is admissible. The same witness was permitted by the court to state that it was not good business to allow a discount of ten to fifteen cents per month on rentals not paid in advance. The commission had, in this case, ordered such a discount of ten cents on the payment of residence rentals within the first ten days of the month succeeding the service, and of fifteen cents on business telephones under like circumstances. Whether this order was so unjust and unreasonable as to be confiscatory of the company's property was an issue being tried. It was a matter involving a business policy or practice, and an ability to judge the results of such practice depends upon experience. The more experience, the better the ability to so judge. One who has had opportunity to see the results of such practice in many instances may aid an inexperienced trial court by stating, not alone each particular instance within his observation, but a general opinion so formed.

The remaining illustration of this character chosen by appellant is its objection to a statement by said witness of his opinion as to what is a reasonable rate

6. of return upon an investment like that of the appellee. The witness answered eight per cent.

Reasonable rates of interest differ according to circumstances surrounding the investment. Even agreements as to interest rates are made after consideration of the risk. When circumstances affecting the risk are of a common and ordinary character, and generally well known, there is little trouble in naming a reasonable



rate proportioned to such risks. When the risk can only be known by extended experiments and experience, those having such experience are able to aid others who do not have such experience or knowledge, but whose duty it is, nevertheless, to say whether the rate is reasonable when the interests of all concerned are involved. One having technical knowledge, or whose extensive observations enable him to have an opinion, may advise another in need of such advice.

This cause was so fully and fairly tried in the circuit court that the appellant, reserving the exceptions herein specially noted, says it can "hardly ask the court to reverse the case for insufficiency of evidence." We have carefully considered all the special matters relating to the admission of evidence, and are satisfied that so far as such questions are concerned the judgment below should be affirmed.

The circuit court found as a fact that appellee had paid into the treasury of the state the sum of \$521.41, as ordered by the commission, said amount being the expense incurred by the commission in the proceeding and hearing by the commission relating to appellee's rules and rates. The seventh conclusion of law stated by the circuit court is that this amount be repaid to appellee by the commission.

The order of the commission requiring appellee to pay the commission's expenses was not a ruling on an issue tried by the commission. It was rather like a

7. judgment that the commission recover its costs because appellee was found to be in the wrong. It resulted from a decision against appellee of the issues tried by the commission. The statute, §10052v2 Burns 1914, Acts 1913 p. 167, §74, allows the commission to tax such expenses only when it finds that an order should be entered against the utility being investigated. When it was by the circuit court on appeal adjudged that the

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James v. State—188 Ind. 579.

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commission's decision on the issue involved before the commission was wrong, it followed that the commission's order that appellee pay the commission's expenses was also wrong, and as a consequence said order as to costs was set aside by the court. To the commission is appropriated a fund out of which the commission shall primarily pay the expenses of such investigations, the state, or the fund, to be reimbursed only when such expenses are properly recoverable from those against whom orders are made. Hence, when its order is set aside, the commission should out of said fund return the amount so improperly collected. The circuit court's general order and judgment that appellee recover of appellant his costs requires that appellee be so repaid.

The trial court is directed to modify its conclusions of law by striking therefrom the seventh conclusion. Otherwise the judgment below is affirmed.

NOTE.—Reported in 122 N. E. 328. See under (4-6) 17 Cyc 224, 227.

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### JAMES v. STATE OF INDIANA.

[No. 23,543. Filed November 25, 1919.]

1. INTOXICATING LIQUORS.—*Charging Offense.—Exceptions.*—The charge that the defendant on a certain date, in a named city and county of the state, did then and there unlawfully keep intoxicating liquor, to wit, whisky, gin, wine and beer with intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons to the affiant unknown sufficiently charged an offense, under the Prohibition Act, Acts 1917 p. 15, §4, though it did not negative the exception in the proviso. p. 581.
2. INTOXICATING LIQUORS.—*Keeping Place.—Nuisance.—Charging Offense.—Excluding Home.*—In charging the illegal sale, barter, etc., of intoxicating liquors under §4, Acts 1917 p. 15, or the maintenance of a place for such illegal purposes, defined as a nuisance by §20 of the act, it was not necessary to exclude the home of the accused, on the theory that he had the right

- to keep intoxicating liquor there and to serve it to guests, since the act does not authorize the keeping of the liquor in the home for sale, barter, exchange or to be otherwise disposed of contrary to law. p. 581.
3. **STATUTES.**—*Prohibition Act.*—*Title and Subject.*—*Constitutionality.*—The Prohibition Act, Acts 1917 p. 15, is not violative of Art. 4, §19, of the Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. p. 582.
4. **CRIMINAL LAW.**—*Affidavit.*—*Jurat.*—*Character of Officer.*—An affidavit is not defective for failing to show the official character of the officer who administered the oath. p. 583.

From Marion Criminal Court; *James A. Collins*, Judge.

Prosecution by the State of Indiana against Louis James. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Holmes & McCallister*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

**WILLOUGHBY, J.**—The appellant appeals from a conviction in the criminal court of Marion county. The case was first tried in the city court of the city of Indianapolis, and from a conviction in that court appellant appealed to the Marion Criminal Court, where a jury trial was had, and the defendant found guilty on the second and third counts of the affidavit, and his punishment fixed at imprisonment in the Marion county jail for a period of sixty days and a fine of \$200. A separate verdict was returned on each count and the same punishment fixed. Judgment was rendered on both verdicts. No evidence is set out in the record and the appellant, in his brief, says that he raises no question on the instructions or evidence in the case.

The defendant moved to quash each count of the affidavit for the reason that neither of said counts state

facts sufficient to constitute a public offense. No other reason is assigned.

The second count is based on §4 of chapter 4, Acts 1917 p. 15, which provides that "after the second

1. day of April, 1918, it shall be unlawful for any person to manufacture, sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor, or to keep any intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided." This second count of the affidavit charges that Louis James, "on the 25th day of November, 1918, at the city of Indianapolis, in Marion county, in the state of Indiana, did then and there unlawfully keep intoxicating liquor, to wit, whiskey, gin, wine and beer with intent then and there to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons to the affiant unknown within the state." This is a sufficient charge. It was not necessary to state the exception contained in the proviso. *State v. Sarlin* (1919), 188 Ind. 359, 123 N. E. 800.

The third count of the affidavit is based on §20 of chapter 4, Acts 1917, which provides that: "Any room, house, building, boat, structure or place of any

2. kind where intoxicating liquor is sold, manufactured, bartered or given away in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquor as a beverage, or any place, building or club where such liquor is kept to be drunk as a beverage by the members thereof or any other persons, or any place where such liquor is kept for sale, barter, or delivery in violation of the laws of this state, and all intoxicating liquor and all property kept in and used in maintaining such a place, are hereby declared to be a common nuisance; and any person who maintains or assists in maintaining such common nuis-

ance, shall be guilty of a misdemeanor," etc. The third count, after stating the venue, charges that the defendant "did then and there unlawfully maintain and assist in maintaining a common nuisance, to wit, a room and place where intoxicating liquors were then and there kept for sale, barter, and delivery in violation of the laws of this state, and where persons were then and there permitted to resort for the purpose of drinking said intoxicating liquors as a beverage and said intoxicating liquor, to wit: whiskey, gin, wine and beer kept in and used in maintaining said place."

Appellant claims that neither of the counts contain an allegation excluding the home where he had a right to have liquor and had a right to dispense it to his guests.

Appellant seems to overlook the fact that the law does not authorize him to keep liquor in his home for sale, barter, or exchange, or keep it in his home with intent to sell, barter or otherwise dispose of the same contrary to law.

Appellant also claims that chapter 4 of the acts of 1917 is unconstitutional, in that it violates §19, Art. 4, of the Constitution of Indiana, which provides

3. that: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." This court has decided that question adversely to appellant's contention. *Schmitt, Supt., v. F. W. Cook Brewing Co.* (1918), 187 Ind. 623, 120 N. E. 19, 23.

The affidavit is not defective on account of its

4. failure to show the official character of the officer who administered the oath. *State v. Osborn*

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James v. State—188 Ind. 579.

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(1900), 155 Ind. 385, 391, 58 N. E. 491; *Brooster v. State* (1860), 15 Ind. 190.

The court did not err in overruling appellant's motion to quash each count of the affidavit.

Appellant asserts that the court erred in overruling his objection to the rendition of judgment against him. The appellant's brief discloses that the objections of appellant to the rendition of the judgments were set forth in two motions filed in the trial court, in which the reason is stated that the jury signed two separate verdicts finding the defendant guilty of two separate and distinct charges in the affidavit, and that one of said verdicts was not properly returned into court, and that the verdict on the second count of the affidavit was not returned and read in open court, and that the verdict on the second count of the affidavit was discovered after the jury had been discharged.

The record shows this statement to be incorrect, and affirmatively shows that each of said verdicts was duly returned in open court. The statement on that subject in the record is as follows: "The jury retire to deliberate on their verdict, being in charge of Clarence W. Clegg, a duly sworn bailiff of this court, and after a time passed in deliberation, the jury, accompanied by the bailiff, returned into open court the following verdicts," and then, following this, each verdict is set out in full in the record.

No other question is presented in this appeal. No error being shown, the judgment is affirmed.

NOTE.—Reported in 125 N. E. 211.

## STATE v. BRUMFIEL.

[No. 23,407. Filed November 25, 1919.]

1. **CRIMINAL LAW.—Counties.—Presenting False Claims.—Evidence.—Admissibility of Claim.**—In the prosecution of a county official for unlawfully receiving compensation in addition to his salary, it was error to refuse to admit in evidence instruments purporting to be the defendant's claim and the warrant drawn therefor, on the defendant's objection that they were not for compensation for services that the defendant was obligated to render for the reasons that the claim appeared on its face to be for "expense," and that the words "G. R. C. Fund" appearing on the warrant, as shown by the defendant's preliminary examination, meant "gravel road construction and expense fund," where the state offered to show that the defendant had not incurred any expense in reference to any of the matters mentioned in the claim; the mere verbiage of the instruments, in view of the offered evidence, could not foreclose the charge in the indictment. p. 585.
2. **CRIMINAL LAW.—Evidence.—Defendant's Admission Before Grand Jury.**—In a prosecution of a county official for unlawfully receiving compensation in addition to his salary, it was error to refuse to permit a member of the grand jury to repeat what the defendant had stated as a witness before that body for the purpose of showing that the defendant admitted that the claim purporting to be for expenses was not for expenses personally incurred, the purpose not being to convict the defendant of perjury, nor to ascertain whether his later testimony was consistent with his testimony before the grand jury. p. 586.

From Grant Circuit Court; *Nelson G. Hunter*, Special Judge.

Prosecution by the State of Indiana against Oscar M. Brumfiel. From a judgment of acquittal, the state appeals and presents reserved questions of law. *Appeal sustained.*

*Ele Stansbury*, Attorney-General, *Elmer E. Hastings* and *Dale F. Stansbury*, for the state.

*Stricler & Messick* and *Condo & Browne*, for appellee.

**HARVEY, J.**—Appellee was acquitted, by a directed

verdict, of a charge, by indictment, of unlawfully receiving compensation from the county in addition to his salary as a county commissioner. The state presents reserved questions of law.

The state complains that the court refused to allow in evidence an instrument purporting to be the claim by appellant against the county, and, further, so refused an instrument purporting to be the warrant received in payment of said claim.

The claim is objected to because it reads for "expense," and thus, on its face, shows that it is not for compensation for services which the defendant

1. was obligated to render as county commissioner.

The state offered to follow with evidence explaining that defendant had not incurred, personally, any expense in reference to any of the roads mentioned in the claim, and that the same was to compensate defendant for his time and services as a commissioner, and that defendant had so stated, and, further, that the claim was allowed and paid. Defendant was charged with presenting an unlawful claim. The mere verbiage of the claim cannot, in view of the offer of explanatory evidence, foreclose the charge in the indictment. If the claim was unlawful, the wording of the same may have been intended as a cover for its illegality. The same was subject to such explanation. The objection should have been overruled.

The warrant when identified and marked as an exhibit was offered in evidence. Defendant, after preliminary examination of the witness, and thereby showing that the letters in the face of the warrant, to wit, "G. R. C. Fund," mean "gravel road construction or expense fund," objected and stated substantially the same ground as stated in objection to the claim. The objection should have been overruled.

Appellant's further complaint is that the court erred



in refusing to permit a witness, who was a member of the grand jury which returned the indictment

2. against defendant, to repeat what defendant, who had been subpoenaed as a witness before the grand jury, had stated to the grand jury, the purpose being to show that defendant admitted that the claim was not for expenses he had personally incurred; the purpose not being to thereby convict defendant of perjury upon a trial of defendant on a charge of perjury; nor to ascertain whether the later testimony of the witness was consistent with his testimony before the grand jury.

The objection of defendant should have been overruled. *Hinshaw v. State* (1896), 147 Ind. 334, 47 N. E. 157, and cases cited.

As stated in appellant's brief, all other points made are covered by the rules above announced.

The appeal is sustained at the costs of appellee as to the appeal.

NOTE.—Reported in 125 N. E. 40.

### CITY OF INDIANAPOLIS ET AL. v. BRYAN.

[No. 23,369. Filed November 25, 1919.]

1. MUNICIPAL CORPORATIONS.—*Public Improvements.*—*Assessments.*—*Authority to Levy.*—A municipality has no power to raise money to pay the costs and expenses of making a local public improvement, unless such authority is expressly conferred by the legislature. p. 589.
2. MUNICIPAL CORPORATIONS.—*Public Parks.*—*Lands Outside Corporate Limits.*—*Power to Assess.*—The legislature had authority to grant to a city, as in Acts 1911 p. 231, §8748 *et seq.* Burns 1914, authority to levy assessments on realty benefited by a park improvement, though lying outside the corporate limits, but within the assessment district created by the board of park commissioners, unless the exercise of such power would deprive the parties so assessed of some right guaranteed by fundamental law. p. 589.

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City of Indianapolis v. Bryan—188 Ind. 586.

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3. EMINENT DOMAIN.—*Compensation.—Public Improvements.—Benefits.*—Special assessments for local public improvements are levied on the theory that the lands affected are benefited to the extent of the assessments, and the special benefits are therefore regarded as just compensation for the amount levied. p. 589.
4. MUNICIPAL CORPORATIONS.—*Parks.—Public Improvements.*—The construction of a boulevard or park improvement by the city of Indianapolis, under Acts 1911 p. 231, §8748 *et seq.* Burns 1914, was an improvement of such a public nature that real estate lying outside the corporate limits, but within the assessment district created by the board of park commissioners, could be assessed with its proportion of the cost, and such assessment did not constitute a taxation of such property for the benefit of the city in its corporate capacity. p. 589.
5. TAXATION.—*Special Assessments.*—Though special assessments are a form of taxation, they are not made and collected in the exercise of the general taxing power by which revenue is raised for governmental expenses. p. 590.
6. MUNICIPAL CORPORATIONS.—*Assessment Districts.—Legislative Power.*—The legislature has power to authorize the establishment of assessment districts without regard to the boundaries of municipalities. p. 591.
7. CONSTITUTIONAL LAW.—*Park Improvements.—Statute.—Privileges and Immunities.*—The act of 1911 relative to the department of public parks in cities of the first and second classes, Acts 1911 p. 231, §8748 *et seq.* Burns 1914, under which an assessment district was formed to pay the cost of a boulevard improvement by the city of Indianapolis, including property outside the city limits, is not unconstitutional on the ground that it grants privileges or immunities to the citizens of such city which on the same terms do not belong equally to the owners of assessed property outside the city. p. 591.

From Marion Superior Court (96,989) ; *W. W. Thornton*, Judge.

Suit by Ellen C. Bryan and others against the city of Indianapolis and others. From a decree for the plaintiffs, the defendants appeal. *Reversed.*

*Walter Meyers, William A. Pickens, Paul G. Davis, Edward W. Hohlt and Robert A. Adams*, for the appellants.

*George Burkhart*, for appellees.

LAIRY, J.—The decree from which this appeal was taken was rendered by the superior court of Marion county in a suit brought by appellees, who were the owners of real estate outside of the city of Indianapolis on which assessments had been made to pay a portion of the costs and expenses of appropriating and improving certain land for parkway and boulevard purposes. The purpose of the suit was to obtain an injunction restraining the defendants from enforcing the collection of such assessments against the lands of appellees and a judgment quieting the title of appellees in their lands as against the assessments so made, on the theory that the statute authorizing the proceeding in pursuance of which the assessments were made is void in so far as it purports to authorize assessments on lands outside the corporate limits of the city because it is in conflict with certain provisions of the state and the federal Constitutions. As shown by the complaint, the proceedings were instituted by the board of park commissioners of the city of Indianapolis under the provisions of chapter 231 of the acts of 1911, which is an act concerning the department of public parks in cities of the first and second classes. Acts 1911 p. 566, §8748 *et seq.* Burns 1914. The complaint shows that such steps were taken in the proceeding under the act and in compliance with its provisions as resulted in fixing the assessments which, by the prayer of the complaint, appellees asked the court to annul.

A demurrer addressed to the complaint was overruled, to which ruling appellants excepted. On the refusal of appellants to answer, the court entered a decree enjoining appellants from taking any steps to enforce the assessments against the tracts of land described in the complaint, and adjudged that the title of appellees to the several tracts owned by each be quieted. The action of the court in overruling appellants' demurrer to

the complaint is assigned as error. It thus appears that the only question for decision depends on the validity of the act cited in so far as it purports to affect lands outside of the corporate limits of the city.

A municipality has no power to raise money to pay the costs and expenses of making a local improvement of

a public character, unless such authority is ex-

1. pressly conferred by the legislature. Appellees do not deny, but expressly admit, that the statute under consideration, if valid, expressly confers

2. the power to levy assessments on real estate benefited lying outside of the corporate limits of the city and within the assessment district created by the board of park commissioners. The legislature had power to grant such authority, unless the exercise of the power granted would have the effect of depriving the parties so assessed of some right guaranteed by fundamental law.

Appellees first assert that the enforcement of an assessment made under the power so granted as against their lands would constitute the taking of prop-

3. erty for a public use without just compensation.

Special assessments are made on the theory that the lands on which they are levied are enhanced in value or otherwise benefited by the improvement to the extent of the assessments made. The special benefits accruing to the land affected are regarded in law as just compensation for the amount levied and collected as an assessment. *Harmon v. Bolley* (1918), 187 Ind. 511, 120 N. E. 33, 2 A. L. R. 609; *Wright v. House* (1918), 188 Ind. 247, 121 N. E. 433.

The next point made is that the work for the construction of which the assessment was levied is the private property of the city of Indianapolis, and that it

4. is not such a local improvement of a public nature as can be constructed and paid for, either in whole

or in part, by special assessments levied on property affected. A boulevard is a driveway open to the general public, and is constructed for the public use and benefit. The construction of such a work is in its very nature an improvement of a public character, and it may be so located as to confer a special and peculiar benefit on real estate in the same vicinity. Real estate so affected and peculiarly benefited may be assessed to pay the costs of making such an improvement on the ground that it is a local improvement of a public nature. *St. Louis v. Handlan* (1911), 242 Mo. 88, 145 S. W. 421; *West Chicago Park Comrs. v. Farber* (1898), 171 Ill. 146, 49 N. E. 427. The enforcement of the act, by levying and collecting assessments on real estate lying outside of the corporate limits of the city, would not result in the taxation of such property for the benefit of the city of Indianapolis in its corporate capacity as contended by appellees. While special assessments are a form of taxation, they are not made and collected in the exercise of the general taxing power of municipalities by which they raise revenue for the purpose of defraying the expense of the maintenance and administration of the government. *Wright v. House, supra*. The assessments against the real estate of appellees were levied for the sole purpose of paying the costs and expenses of making the improvement, and all funds derived therefrom must be applied to that purpose and no other. The assessment against any tract of land cannot exceed the benefits accruing to it on account of the improvement, and no part of the funds so raised can be applied to pay existing debts of the city or to defray the expenses of the city government. For the reasons just stated the case at bar is to be distinguished from the case on which appellees rely to sustain them on this point. *Matter of Lands in Town of Flatbush* (1875), 60 N. Y. 398, 406. In the case cited the court said: "Had

the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted; and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park."

The legislature has power to authorize the establishment of assessment districts without regard to the boundaries of municipalities organized for gov-

6. ernmental purposes. *Board, etc. v. Harrell* (1896), 147 Ind. 500, 46 N. E. 124; *Brown, Treas., v. Baltimore, etc., R. Co.* (1917), 186 Ind. 81,
7. 115 N. E. 86. In the exercise of this power, the legislature conferred on the park board of the city of Indianapolis authority to prescribe the limits within which private property shall be deemed benefited by the proposed improvement, which benefit districts may include lands benefited outside of said city not more than five miles from the limits thereof. Acts 1911 p. 566, §§11, 14, 16, §§8756, 8760, 8762 Burns
- 1914. Under the authority so conferred the board of park commissioners had power to include the lands of appellees within the assessment district of lands benefited by the improvement. The statute under consideration is not open to the objection that it grants privileges or immunities to the citizens of Indianapolis which upon the same terms do not belong equally to appellees.

The statute under consideration is not in conflict with the provisions of the state or the federal Constitutions in any of the particulars stated in the complaint. It is a valid enactment as against the attack so made, and

the court erred in overruling the demurrer addressed to the complaint.

Judgment reversed, with instructions to sustain appellants' demurrer to the complaint.

NOTE.—Reported in 125 N. E. 38.

### CLEVENGER v. STATE OF INDIANA.

[No. 23,514. Filed November 26, 1919.]

1. CRIMINAL LAW.—*Affidavit.—Bribery.—Words Descriptio Personae.*—An affidavit under §2425 Burns 1914, Acts 1905 p. 584, §519, relating to bribery of public officials, charging that a township trustee entered into a contract with the defendant, "agent of" a named company, was not insufficient, and cannot be construed as alleging that the contract was made by the defendant, on behalf of the company, the words following the defendant's name being *descriptio personae*. p. 594.
2. CRIMINAL LAW.—*Affidavit.—Bribery.—Sufficiency as Showing Knowledge.*—An affidavit for bribery, under §2425 Burns 1914, Acts 1905 p. 584, §519, which charged in substance that B was the duly elected and qualified trustee of a certain township, that as such trustee he entered into a contract with the defendant for the repair of a furnace in a high school building of the township, and that the defendant unlawfully, feloniously and corruptly paid B, trustee, a certain sum as a percentage, reward, etc., in violation of the statute, was not insufficient as against the objection that it failed to allege that the defendant knew that B was then a township trustee, since the allegations, when considered together, sufficiently show such fact. p. 595.
3. CRIMINAL LAW.—*Evidence.—Sufficiency.—Review.*—Where, in a prosecution for bribery, the evidence was conflicting on the issue as to whether the defendant, on the alleged date of the bribery, had a contract with another who was acting in his official capacity as township trustee, the court on appeal will not disturb the jury's verdict of guilty, the presumption being that the trial court heard all the evidence and considered it sufficient to sustain the verdict. p. 595.
4. CRIMINAL LAW.—*Bribery.—Evidence.—Proof of Payments in Other Counties.—Sufficiency.*—In a prosecution for bribery of a township trustee, under §2425 Burns 1914, Acts 1905 p. 584, §519, evidence of payments by the defendant to such trustee in

counties other than that of the venue would not be sufficient to show payment of the bribe as charged in the county of the venue, but could be considered only as bearing on the purpose of payment in case the jury found from other evidence that such payment was made; and, where there was a sharp conflict in the evidence relating to the payment made in the county of the venue as charged, it was error to refuse an instruction limiting the application of the evidence as to the payments in the other counties. pp. 600, 602.

5. **CRIMINAL LAW.—Evidence of Other Crimes.—Purpose.**—In a criminal prosecution, proof of the commission of other criminal acts is admissible for the purpose of showing motive, criminal intent or guilty knowledge, where such motive, intent or knowledge is an essential ingredient of the crime charged. p. 602.

From Clay Circuit Court; *George W. Brill*, Special Judge.

Prosecution by the State of Indiana against Earl L. Clevenger. From a judgment of conviction, the defendant appeals. *Reversed*.

*White & Haymond* and *Bernard M. Robinson*, for appellant.

*Ele Stansbury*, Attorney-General, *Dale F. Stansbury* and *W. L. Slinkard*, for the state.

**LAIRY, J.**—Appellant was charged by affidavit and convicted in the Clay Circuit Court of a crime defined by §2425 Burns 1914, Acts 1905 p. 584, §519. The section cited defines two offenses. The first part of the section makes it a felony for any person to pay any money or to deliver anything of value to any persons holding certain offices named therein, for the purpose of obtaining any contract for the construction of certain public buildings and other works of a public nature named therein, or for the performance of any work or the furnishing of any material to any state, county, town, or city, over which such person has any jurisdiction. Appellant was charged and convicted of the offense defined by the last part of the section which pro-



vides in substance that any person who, having any such contract, shall pay or agree to pay to any of the officers or persons above named any money, percentage, reward, drawback, premium or profits on such contract, on conviction, shall be fined not less than \$300 nor more than \$5,000 and be imprisoned in the state prison not less than two years nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.

The affidavit charged that, at the time mentioned therein, Carl A. Biller was the legally elected and acting township trustee of Posey township in Clay county, Indiana, and that on or about the — day of June, 1917, as such trustee, Carl A. Biller entered into a contract with Earl L. Clevenger, agent of the Hoosier Warming and Ventilating Company, to repair the heating furnaces in the township high school building near Staunton, in said Posey township for said school township. It was further charged in the affidavit that on or about January 23, 1918, in the county of Clay and the State of Indiana, the said Earl L. Clevenger having said contract as aforesaid did then and there, unlawfully, feloniously and corruptly pay to said Carl A. Biller, trustee, as aforesaid, forty dollars lawful money of the United States of America as a percentage, reward, drawback, premium and profit on such contract, contrary to the form of the statute.

The sufficiency of the affidavit was questioned by a motion to quash and also by a motion in arrest of judgment, both of which motions were overruled.

The first objection urged to the affidavit is that it does not state with sufficient certainty that the contract on which the money was alleged to have been

1. paid was a contract of the trustee with appellant.

The charge is that Carl A. Biller, as trustee, entered into the contract with Earl L. Clevenger, agent of

the Hoosier Warming and Ventilating Company. The words following the name of appellant in the last sentence are regarded as *descriptio personæ*, and cannot be construed to mean that appellant, as agent of the company named, made the contract for and on behalf of his principal. *State v. Simpson* (1905), 166 Ind. 211, 76 N. E. 544, 1005; *Allen v. State* (1876), 52 Ind. 486; *Weaver v. State* (1856), 8 Ind. 410. The affidavit is sufficient to charge that appellant entered into the contract described in his personal capacity, and that, while he had such contract, he paid to Biller, as trustee, forty dollars with the intent and purpose stated in the affidavit.

A further objection is made to the affidavit on the ground that it fails to charge that appellant knew, on

January 23, 1918, the date on which the money

2. was alleged to have been paid, that Biller was trustee at that time. When all of the allegations of the affidavit are considered together, it becomes apparent that appellant must have known and did know the official character of Biller at the time the money was alleged to have been paid. The affidavit must be held to be sufficient. *State v. McDonald* (1886), 106 Ind. 233, 6 N. E. 607.

The other questions presented arise on the ruling of the trial court on the motion for a new trial. In regard

to the sufficiency of the evidence to sustain the

3. verdict, appellant takes the position that all the evidence, without dispute, shows that the contract for repairing the heating furnaces upon which it is alleged the forty dollars was unlawfully paid was entered into between Biller, as trustee, and the Hoosier Warming and Ventilating Company, by its agent, Roy Alexander; and that appellant, at the time the money is alleged to have been paid, had no contract with the trustee in his official capacity within the meaning of the

statute. The testimony of Alexander and Biller strongly sustain appellant's position, but it cannot be said that there is a total want of evidence to sustain a finding by the jury that the contract was with appellant. There is evidence to show that appellant was engaged in the plumbing business on his own account, and that a large amount of the material for making the repairs, which was furnished by W. H. Johnson and Sons Company, of Indianapolis, was shipped to appellant at Staunton, and was charged to his individual account, which he paid. These circumstances were explained by evidence showing that he was, at the time, president and general manager of the Hoosier Warming and Ventilating Company, and that all goods sold by W. H. Johnson and Sons Company to that company were charged to appellant personally because he had credit with W. H. Johnson and Sons Company. There is also evidence to show that checks given for labor performed in making the repairs were signed by appellant, and that the bill rendered for material and labor, and introduced in evidence, showed that the account was in favor of Earl L. Clevenger, plumber, and that the items therein were charged to C. A. Biller, trustee. It was the province of the jury to consider the circumstances proved, and the explanations made in connection with the direct testimony of the witness bearing on the question, and decide whether appellant did or did not have the contract for repairing the furnaces as alleged in the affidavit. The jury decided, and the trial judge, who heard the evidence and saw the witnesses, has decided that the evidence was sufficient to sustain the verdict on the point under consideration. It will be presumed that the trial court considered all the evidence and weighed it in reaching the conclusion stated. This court cannot weigh evidence. As the evidence is conflicting, the verdict cannot be set aside on the ground stated.

The main facts necessary to establish the guilt of the defendant were: (1) That he had a contract with Biller as trustee of Posey township for the furnishing of material and the performance of work for that township; (2) that while he had that contract he paid to Biller forty dollars or some other amount of money in Clay county, Indiana, within two years prior to the date on which that affidavit was filed, and (3) that the money so paid was a percentage, reward, drawback, premium or profit on such contract.

The witness Biller testified that appellant paid him forty dollars at his office in Staunton on January 22, 1918, at the time witness paid the balance on the heating repairs, and that appellant said that the balance due witness was ninety-five dollars, which he would pay when witness paid for the pump which had been ordered. This was the only evidence as to the payment of any money by appellant to Biller in Clay county, Indiana. Appellant denied making this payment, and further stated that on the day the settlement was made he and two other men, Limbaugh and Gordon, went from the Davis Hotel in Brazil, Indiana, directly to the office of Biller in Staunton; that it was a very cold day; that both these men went into the office with him and remained there during the time he was engaged in making the settlement and collecting the balance due on the heating repairs; and that, after his business was concluded, one of the other men showed some plans to Mr. Biller and talked over some contemplated repairs to the school building, after which they all left the office together. Both Gordon and Limbaugh were produced as witnesses at the trial, and they both corroborated appellant as to the facts just stated. They both further testified that, during the entire time appellant was in the office, they sat by the stove only four or five feet from the desk where the business was transacted, and

heard all that was said, and that nothing was said about the ninety-five dollars or any other amount remaining due to Biller, or that appellant would pay any balance due when the pump was paid for or at any other time. They both testified that no money was paid on that occasion. Mr. Peters, who drove the taxicab, also testified that he took these men, on the day mentioned, from Brazil to the office of Biller in Staunton. Biller testified that no one was present at the office with appellant when the settlement was made and the money paid. All the evidence shows that appellant, Gordon, and Limbaugh were in Staunton to see Biller on December 28, 1917, and took dinner at his house, and Biller testified that this was the only occasion that they were there together, while appellant and the other two witnesses testified that they came again together on January 22, 1918. The witness Peters testified that he brought them over on both trips. The jury by its verdict found that the money was unlawfully paid to Biller by appellant in Clay county, and there is some evidence to sustain the finding. If the jury reached this verdict from a consideration of competent evidence and under proper instructions, this court cannot disturb it.

The testimony of the witness Biller shows that, after the contract for the repairs to the heating plant was entered into, he met appellant in Terre Haute, Indiana, and had a conversation with him in which the repairs were discussed and in which appellant said that he would treat him right and give him ten per cent. of all the work, and asked him if that would be satisfactory, and that witness assented to that arrangement. Biller's evidence also shows that he later gave appellant an order for a pump on which contract appellant agreed to pay him fifty dollars, stating that this amount together with his percentage on the heating repairs would make the amount due him \$200. About September 22, 1917, ac-

According to the testimony of Biller, he gave appellant a check for something over \$1,000 on the heating contract at his office in Staunton, at which time appellant said that he would get the check cashed and give him his commission. Some time in October, Biller testified he met appellant at Terre Haute, where appellant paid him sixty-five dollars while they were seated at a table in a barroom. There is also testimony to show that appellant was in Indianapolis on March 11, 1918, when his books were under examination by the state board of accounts, and that on that day he called appellant at Muncie, Indiana, by long distance from the phone in the office of the state board of accounts. After identifying appellant, Biller asked him if he could not pay him the balance of the ninety-five dollars due him on the job at Staunton. Biller testified to making this request and to the entire conversation held by telephone, and two members of the state board of accounts, who listened to the conversation at extension instruments, corroborate him as to the entire conversation. Appellant admitted in his testimony that he had a conversation over the telephone with Biller on the day mentioned, but he denied that any request was made by Biller for the payment of any balance due him on contract. Appellant stated that Biller told him over the wire that he was in trouble, and requested him to come to Indianapolis, and that he told Biller that he had business in Indianapolis and that he would come over the next morning on a traction car and meet him at the traction station. The evidence shows that they met at the traction station and went from there to a saloon, where appellant gave Biller fifteen dollars. This money was taken by Biller to the office of the state board of accounts, where it was sealed in an envelope. This envelope was produced at the trial and identified, and it was opened by a witness in the presence of the jury and the contents submitted to the jury for

inspection. Appellant by his testimony admitted that he met Biller and gave him fifteen dollars at a bar in Indianapolis, but stated that he let him have the money as a loan on his representation that he needed the money to pay his hotel bill

If fifteen dollars was paid Biller in Indianapolis, in violation of the provisions of the statute, that would be a distinct offense of which the courts of Marion

4. county would have jurisdiction, and the same may be said as to the payment of the sixty-five dollars, which Biller testified was paid to him in Vigo county. Appellant was charged with paying money to Biller in Clay county in violation of the statute, and it was incumbent on the state to establish a payment of money in that county in order to authorize a conviction. Clear proof that a payment of money was made in Marion county in violation of the statute could not be regarded as any evidence, either direct or circumstantial, that any money was paid by appellant to the prosecuting witness in Clay county as charged in the affidavit.

At the proper time appellant tendered instruction No. 5, which the court refused to give, and did not give any instruction covering the proposition stated therein. This ruling of the court was assigned as a cause for new trial and is presented for review on appeal. The instruction so tendered and refused is in the following words: "The court instructs the jury that it is the law of this state that a defendant may never be proven guilty of one offense by proving the commission of other crimes. Evidence has been introduced in this trial as to certain alleged payments which the state claims to have been made by the defendant, Earl L. Clevenger, to Carl A. Biller, at Terre Haute, and Indianapolis, Indiana, while said Biller was township trustee of Posey township, Clay county, Indiana, and while said Clevenger had a contract with the said Biller for the repair

of the heating plants in the high school building at Staunton, Indiana. The court instructs you that the defendant, Earl L. Clevenger, is upon trial on an affidavit charging but one crime, namely: That on or about the 23rd day of January, 1918, while having a contract with Biller, township trustee, to repair certain furnaces in the high school building at Staunton, Indiana, said defendant, Clevenger, paid Biller Forty (\$40.00) Dollars as a percentage, reward, drawback, premium or profit on said contract. You are to bear in mind, gentlemen of the jury, that this is the sole and only crime with which the defendant is charged in this case and in arriving at a verdict in this case you are in nowise to determine or consider the guilt or innocence of the defendant with reference to the two other alleged payments that have been offered in evidence in this cause by the state. I further instruct you, gentlemen of the jury, that you are only permitted to consider the evidence with reference to these two transactions in case you first find as a fact beyond every reasonable doubt from the other evidence in the cause that said Clevenger had a contract with Biller as charged and that while having such contract, on or about the 23rd day of January, 1918, he paid Biller the Forty (\$40.00) Dollars as alleged in the affidavit, then and then only are you permitted to consider the testimony with reference to the other two alleged payments, and in the consideration of them you are instructed that the evidence of such payments is to be weighed by you only for the purpose of determining the guilty knowledge, intent, motive or purpose of said Clevenger in paying Biller the said Forty (\$40.00) Dollars if you find the same to have been paid as alleged beyond every reasonable doubt."

It has been frequently decided that proof of the commission of other criminal acts may be proved for the



- purpose of showing a criminal purpose or intent
5. or a guilty knowledge, in cases where such purpose, intent, or knowledge is an essential ingredient of the crime charged, and where the evidence of such other acts tends to establish such criminal motive, intent or such guilty knowledge.
  - 4.

*Thomas v. State* (1885), 103 Ind. 419, 2 N. E. 808; *Rock v. State* (1916), 185 Ind. 51, 110 N. E. 212. In this case it was required to prove, not only that appellant paid the money to Biller as trustee in Clay county, but also that the money was paid as a percentage, reward, drawback, premium or profit. If the jury found from other evidence that appellant did pay the money to Biller as trustee, in Clay county, as charged in the affidavit, it might then properly consider evidence as to other payments by appellant to Biller, in Vigo county and in Marion county, as well as the circumstances attending such payment if shown. Such evidence could not be considered by the jury as lending any support to the fact that appellant paid the forty dollars to Biller in Clay county as charged in the affidavit, but could be considered only as bearing on the purpose with which the money was paid in case the jury found as a fact from other evidence that such payment was made.

In view of the evidence as set out, the failure of the court to limit the application of the evidence under consideration, as requested by appellant, was clearly

4. prejudicial to his rights. Appellant may be guilty as charged in the affidavit; but, before he can be so adjudged, he has a right to have the facts on which guilt depends determined by a jury under proper instructions as to the law. As appears from the preceding statement, there was a sharp conflict in the evidence relating to the payment of the forty dollars at Staunton as charged in the affidavit. This court can-

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Dillon v. State—188 Ind. 603.

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not say that this fact is so clearly and conclusively shown by the other evidence in the case as to render harmless the error of the court in refusing to give the instruction quoted.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 125 N. E. 41. See under (5) 62 L. R. A. 193, 12 Cyc 405, 40 Cyc 2769.

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### DILLON v. STATE OF INDIANA.

[No. 23,605. Filed November 26, 1919.]

1. **STATUTES.—Subjects and Titles.—Prohibition Act.**—The Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, is not violative of Art. 4, §19, of the Constitution on the ground that the title is not broad enough to cover the penalty provision in §4. p. 604.
2. **CRIMINAL LAW.—Appeal.—Motion in Arrest.—Ambiguity.**—The defendant's assertion that the purported paper termed the affidavit is not an affidavit, because it was stamped with a rubber stamp by the officer administering the oath, presents no question for review, it being ambiguous, uncertain and meaningless. p. 605.
3. **CRIMINAL LAW.—Evidence.—Conclusion.—Harmless Error.**—In a prosecution for the violation of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, where the evidence in behalf of the defendant showed conclusively that a bottle contained intoxicating liquor, the statement of a witness for the state that the bottle contained whisky, if improper as a conclusion, was harmless. p. 605.
4. **CRIMINAL LAW.—Intoxicating Liquors.—Opinion Evidence.**—In a prosecution for keeping intoxicating liquors with intent to sell, etc., in violation of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, testimony of a witness that a bottle found in the defendant's possession contained whisky, which he knew by the odor, was admissible as an opinion of the witness. p. 605.
5. **CRIMINAL LAW.—Appeal.—Evidence.—Weight.**—Where there was some evidence to support a conviction, the court on appeal will neither disturb the judgment, nor rule, as a matter of law, that the judgment is contrary to law, on the ground of insufficiency of the evidence. p. 606.

From Marion Criminal Court (23,605); *James A. Collins*, Judge.

Prosecution by the State of Indiana against Thomas Dillon. From a judgment of conviction, the defendant appeals. *Affirmed*.

*J. Herbert Hartman* and *William H. Faust*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

MYERS, J.—Appellant was by affidavit charged, tried and convicted in the Marion Criminal Court of keeping intoxicating liquors with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, in violation of §4 of an act approved February 9, 1917, Acts 1917 p. 15, §8356d Burns' Supp. 1918. The affidavit contained eight counts, to each of which a motion to quash was addressed and sustained to all except the second and third, and as to these it was overruled. Appellant was convicted as charged in the second count; therefore we shall give no attention to the third.

The overruling of appellant's motion to quash count 2 is assigned as error. In support of this assignment

he insists that the penalty provision of §4 of the  
1. aforesaid act is unconstitutional, in that the title thereof is not broad enough to cover such penalty provision as required by Art. 4, §19, of the Constitution of Indiana. Under the rulings of this court appellant's insistence in this respect must be denied. *Republic Iron, etc., Co. v. State* (1902), 160 Ind. 379, 383, 66 N. E. 1005, 62 L. R. A. 136; *Board, etc. v. Scanlan* (1912), 178 Ind. 142, 145, 98 N. E. 801; *Sansberry v. Hughes* (1910), 174 Ind. 638, 642, 92 N. E. 783.

Appellant next insists that the trial court erred in overruling his motion in arrest of judgment. To sustain this motion, he earnestly contends that the second

count of the affidavit fails to state facts sufficient to constitute a public offense, for the reason that the title of the act under which the affidavit is drawn has no reference to the penalty provision in §4, and therefore that portion of the section is within the constitutional inhibition of Art. 4, §19, of our Constitution. We have already seen that appellant's position in this particular cannot be sustained.

He further supports this motion by asserting that "the purported paper being termed the affidavit in this cause is not an affidavit at all, for the reason that the

2. same is stamped with a rubber stamp by the officer who is supposed to have administered the oath." This assertion, because of its ambiguity, uncertainty, and meaninglessness, presents no question.

Appellant's motion for a new trial was overruled, and this ruling is assigned as error. As a cause for a new trial he claims, first, that the court erred in per-

3. mitting a witness for the state on direct examination to testify that the contents of a certain half-pint bottle in evidence was whisky. The objec-

4. tion urged was that the question called for a conclusion. To a further question as to how he knew that it was whisky, he answered, "by the smell—odor." If it could be said that this question and the answer thereto was improper, no harm to appellant could possibly have resulted therefrom, for the reason that appellant by evidence introduced in support of his defense proved positively that this same bottle contained whisky. However, the evidence was properly admitted. The charge in this case was keeping intoxicating liquors with intent to sell, etc. As whisky is intoxicating liquor, witness was entitled to give his opinion as to what the liquid was that was found in appellant's possession as tending to prove the charge.

The further cause relied upon is that the decision of

the court is not supported by sufficient evidence; and that it is contrary to law. We have carefully

5. read the evidence as disclosed by the record, and from which we conclude that there is some evidence to support the decision. This being true, this court cannot disturb or set aside the judgment of the trial court for the want of evidence, or rule, as a matter of law, that the decision was contrary to law on account of the evidence.

Judgment affirmed.

NOTE.—Reported in 125 N. E. 37.

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### WARD v. STATE OF INDIANA.

[No. 23,585. Filed December 10, 1919.]

1. CRIMINAL LAW.—*Verdict on One Count.—Effect on Other Counts.*—In a prosecution for violation of the Prohibition Act, a verdict that found the defendant guilty on the second count of the affidavit, but which was silent as to the first count, amounted to an acquittal on the first count. p. 607.
2. STATUTES.—*Construction.—Ambiguity.*—The rule under which courts may be called upon to construe an ambiguous, uncertain or indefinite statute has no application where the language used is plain and its purpose clear. p. 608.
3. STATUTES.—*Construction.—Prohibition Act.—Prima Facie Evidence of Violation.*—Section 35 of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns 1914, declaring that, within ten days after the taking effect of the act, every person except licensed pharmacists, etc., shall remove all intoxicating liquors in his possession from the state, and failure to do so shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, etc., in violation of the act, the section not applying to specifically named quantities kept by a person in the home for domestic use, was intended to aid in the enforcement of §4 by establishing a rule of evidence to sustain a charge of unlawfully keeping, etc., and does not make the mere keeping of intoxicants by one not falling within the excepted classes an offense subject to the penalty prescribed by §38. pp. 609, 611.
4. STATUTES.—*Adoption from Another State.—Construction.—Presumption.*—The legislature, in adopting a statute of another

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Ward v. State—188 Ind. 606.

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state which had been construed by the courts of that state, also adopted the construction so placed upon it. p. 609.

5. STATUTES.—*Construction.*—*Purpose.*—Though the rule is that courts should so construe statutes as to meet the mischief sought to be remedied, where the legislative intention is plain, and the enactment as a whole covers the various forms of evils sought to be corrected, the reason for the rule ceases. p. 611.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Prosecution by the State of Indiana against Thomas Ward. From a judgment of conviction, the defendant appeals. *Reversed.*

- *McInernys, Yeagley & McVicker*, for appellant.

*Ele Stansbury*, Attorney-General, *A. B. Cronk*, and *Dale F. Stansbury*, for the state.

MYERS, J.—Upon an affidavit filed in the St. Joseph Circuit Court appellant was tried and convicted of having in his possession certain intoxicating liquor,

1. alleged to be in violation of §35, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918. The affidavit was in two counts—the first charged the unlawful keeping of intoxicating liquors with intent to sell, and the second charged unlawful possession of such liquors. The jury returned a verdict of guilty on the second count, and, in accordance with the jury's verdict, appellant was sentenced to pay a fine of \$50 and imprisonment in the county jail for ten days. The verdict of the jury is silent as to the first count, and amounts to a finding of not guilty on that count. *Harvey v. State* (1881), 80 Ind. 142.

Appellant's motion in arrest of judgment was timely made and overruled, and this ruling is assigned as error. The only question presented by this appeal is, Was appellant charged with a public offense?

In order to sustain the ruling of the trial court, we are called upon to so construe §35, *supra*, as defining a

public offense, and then look to §38 of the same

2. act as fixing a penalty for its violation. The rule is well settled that courts may be called upon to construe an ambiguous, uncertain or indefinite statute. But this rule does not obtain, where the language used is plain and its purpose clear, for the reason, as is said in the books, there is no room for construction. *State v. Terre Haute Brewing Co.* (1916), 186 Ind. 248, 115 N. E. 772; *Cleveland, etc., R. Co. v. Marshall* (1914), 182 Ind. 280, 105 N. E. 570, Ann. Cas. 1917A 756; *Cheney v. State, ex rel.* (1905), 165 Ind. 121, 74 N. E. 892; *Eastman v. State* (1887), 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; 2 Lewis' Sutherland, Statutory Construction (2d ed.) §367.

Section 35, *supra*, reads as follows: "Within ten (10) days after the date when this act has become operative, every person except licensed pharmacists, wholesale druggists, manufacturing chemists or public hospitals shall remove or cause to be removed all intoxicating liquors in his possession from the state and failure to do so shall be *prima facie* evidence that such liquor is kept therein for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act: Provided, however, That this section shall not apply to alcohol kept for chemical or manufacturing purposes, or to one (1) gallon of intoxicating liquor, other than beer, or twelve (12) quarts of beer, or all wine manufactured for his own domestic consumption kept in his own home for domestic use, held by an individual; and provided further, that any licensed pharmacist, wholesale druggist, manufacturing chemist or public hospital shall report to the clerk of the circuit court within said ten (10) day period the kinds and amount of intoxicating liquor on hand."

The affidavit shows that appellant was not a licensed

pharmacist, wholesale druggist, or manufacturing chemist; consequently he was a person within the class

3. required to "remove or cause to be removed all intoxicating liquors in his possession from the state," except a certain specified quantity kept for his own use, and, failing so to do, the penalty fixed is that the possession of such excess quantity shall be "*prima facie* evidence that such liquor is kept therein for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this act." It will be noticed that this section does not make the possession by such person of intoxicating liquors in any quantity unlawful, nor is any other penalty provided for failure to remove the same within the ten-day limit. By reference to §4 of this act it will be seen that it is made unlawful for any person "to keep any intoxicating liquor, with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided," so that, when §4 and §35 are considered together, it may be plausibly said that the purpose of §35 was to aid in the enforcement of §4 by establishing a rule of evidence to sustain a charge of unlawfully keeping, etc. *State v. McIntyre* (1905), 139 N. C. 599, 52 S. E. 63.

As to any matter material to the question here presented, §35, *supra*, and §28, Laws of Washington 1915 p. 2, are substantially the same. The Supreme

4. Court of that state had before it the question of whether the facts stated in an information based upon §22 of the laws of that state charged a crime. The act of which §35, *supra*, is a part has no provision corresponding to §22 of the Laws of Washington, but the Supreme Court of Washington in passing upon the question before it deemed it necessary to consider §28, and in an opinion filed on July 5, 1916, in the case of *State*



v. *Eden* (1916), 92 Wash. 1, 158 Pac. 967, 159 Pac. 700, said: "When the act was passed, it was recognized that intoxicating liquors would be held within the state by persons who had previously been engaged in the sale thereof. And it is common knowledge that, prior to the taking effect of this act, the barter and sale of intoxicants within the state was permitted by law; and it is reasonable to suppose that, at the time this act would take effect, namely, on January 1, 1916, intoxicating liquors theretofore lawfully obtained would be in the possession of persons who had theretofore lawfully dealt therein. And in order that those persons might dispose of their surplus stock, §28 was passed, which provides that every person shall remove, or cause to be removed, all intoxicating liquors in his possession, from the state, and that for a period of ten days thereafter it should not be necessary to obtain a permit for the shipment out of the state of intoxicating liquors held within the state at that date. The penalty for keeping a greater quantity of liquor was named in §28, to the effect that failure to remove the same would be '*prima facie* evidence that such liquor is kept therein for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act.' The keeping of such liquor was not made a crime unless made so by §22." A petition for a rehearing in that case was overruled August 19, 1916. When the two, §35 and §28, *supra*, are read together, it conclusively appears that the general assembly of this state had before it §28, and in adopting it, except in some minor details, it also adopted the construction placed upon it by the Supreme Court of that state. *City of Laporte v. Gamewell, etc., Tel. Co.* (1896), 146 Ind. 466, 469, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. 359; *McIntyre v. State* (1907), 170 Ind. 163, 83 N. E. 1005;

*Robertson v. Ford* (1904), 164 Ind. 538, 74 N. E. 1. The intention of the general assembly in passing §35, *supra*, is thus disclosed, and to give the language

3. thus employed, any other meaning would be to violate fundamental principles. We are not unmindful of the well-recognized rule that courts

5. should so construe statutes as to meet the mischief sought to be remedied, but where, as here, the legislative intention is plain, and the enactment as a whole covers the various forms of evil existing and sought to be corrected at the time it was passed, the reason for the rule ceases. It may be said that §38 was intended to furnish an additional penalty to that specially mentioned in §35, but we cannot agree to this conclusion, for, in our opinion, the penalty provided in §38 has reference to those sections in the act where the doing or the failure to do certain things is made unlawful, and no penalty is therein provided for a violation thereof.

We therefore conclude that the second count of the affidavit upon which appellant was tried and convicted failed to state a public offense, and the motion in arrest of judgment should have been sustained.

Judgment reversed, with instructions to the trial court to sustain appellant's motion in arrest of judgment, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 125 N. E. 397.

## GEORGE KRAFT COMPANY v. HELLER.

[No. 23,370. Filed December 12, 1919.]

1. **FRAUDULENT CONVEYANCES.**—*Bulk Sales.*—*Fraudulent Intent.*—Under the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, the question as to whether a fraudulent intent in fact existed and entered into a transfer of merchandise in bulk is not material; if it is found as a fact that the purchaser in such transaction complied with the act, the court can say as a matter of law that there was no intent to defraud the creditors of the seller; but if the purchaser failed to comply with the act, the court is required to say as a matter of law that the transaction was tainted with a fraudulent intent. p. 614.
2. **FRAUDULENT CONVEYANCES.**—*Bulk Sales.*—*Failure to Give Notice.*—*Fraud per se.*—The failure of the purchaser of a stock of goods to give notice required by the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, renders the transaction fraudulent *per se* as to the seller's creditors, regardless of the actual good faith of the parties or of the compliance with the other provisions of the act; and this is true even though it appears that a compliance with the provisions of the act would have been of no benefit to a complaining creditor, no reference to his claim having been made on the list of creditors. p. 616.
3. **FRAUDULENT CONVEYANCES.**—*Bulk Sales.*—*Statute.*—*Claims Affected.*—Under the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, neither secured claims, nor claims disputed and in litigation, are excepted from the operation of the statute. p. 618.
4. **APPEAL.**—*Suspension of Proceedings.*—The bond filed in perfecting a term-time appeal stays all proceedings for the enforcement of the judgment during the pendency of the appeal, and suspends the authority of a receiver appointed therein to take charge of the property affected during such time. p. 619.

From St. Joseph Superior Court; *George Ford*, Judge.

Action by Adolph Heller against the George Kraft Company and others. From an interlocutory order appointing a receiver, the defendants appeal. *Affirmed.*

*Hubbard & Pettingill* and *Newman, Poppenheusen, Stern & Johnson*, for appellants.

*G. A. Farabaugh*, for appellee.

LAIRY, J.—This is an appeal from an interlocutory order appointing a receiver in a proceeding filed by appellee against appellant, wherein appellee demanded judgment in the sum of \$7,500 and prayed an order of court declaring appellant George Kraft Company to be a receiver of a stock of merchandise purchased by it in bulk from the Independent Five and Ten Cent Stores of New York. Appellee alleged that the Independent Five and Ten Cent Stores of New York was indebted to him in the sum of \$7,500 at and prior to the date of its sale of said stock of merchandise to appellant as shown by a judgment of the LaPorte Circuit Court for that amount, and facts are alleged showing that appellant purchased the stock and fixtures in bulk, and that it failed to comply with the provisions of §7471a Burns 1914, Acts 1909 p. 122, relating to such sales.

The sworn complaint and a certified copy of the judgment were introduced in evidence on behalf of plaintiff, and the defendants introduced certain affidavits as a defense. After a consideration of the evidence so introduced the court entered an order declaring and appointing appellant George Kraft Company receiver of the stock of goods so purchased from the Independent Five and Ten Cent Stores of New York for the benefit of plaintiff, and directing it to qualify as such receiver by filing bond in the sum of \$10,000. From the order so entered this appeal is taken. The only question presented by the several errors assigned relates to the sufficiency of the evidence to sustain the finding on which the order is based.

Statutes regulating the sales of stocks of merchandise in bulk similar to the one on which this proceeding is based have been passed by nearly all of the states of this country. This widespread legislation on the subject indicates that there was a general belief in the existence of a prevalent evil which such legislation was intended

to suppress. The evil sought to be corrected was the tendency and practice of merchants heavily indebted to make secret sales of their merchandise in bulk for the purpose of defrauding their creditors. Under the statutes of this state as existing prior to the enactment of the one under consideration, the question as to whether a conveyance of lands or an assignment or transfer of personal property was or was not made with a fraudulent intent for the purpose of defrauding, hindering or delaying creditors was one of fact. §§7479, 7483 Burns 1914, §§4920, 4924 R. S. 1881. Under the law as it so stood, the court or jury trying the case was required to decide from the facts and circumstances that a fraudulent intent did or did not exist as a fact. It must be assumed that some reason known to the legislature existed which led that body to the conclusion that the rule requiring fraudulent intent to be proved as a fact from subsidiary facts and circumstances disclosed by the evidence should be abrogated in cases involving the sale of stocks of merchandise in bulk. As a consequence the legislature by the act under consideration placed sales of this kind in a class by themselves, and provided that the purchaser at such sales should take certain steps specified in the statute prior to concluding the sale and paying the purchase money. The statute provides that, in case the purchaser conforms to the provisions of the statute, he shall not be held accountable in any way to any creditor of the seller. §7471c Burns 1914, *supra*. On the other hand, if he fails to take the steps imposed in conformity to the terms of the act, the sale is fraudulent as a matter of law so far as the creditors of the seller are concerned. §7471a Burns 1914, *supra*.

Under this statute, the question as to whether a fraudulent intent in fact existed and entered into the transfer is not material. The effect of the act is

1. to take the question of fraudulent intent out of

the realm of fact and place it in the realm of law. If it is found as a fact that the purchaser took the steps provided by the act in conformity with its terms, the court can say as a matter of law that the purchaser had no intent to defraud the creditors of the seller, and that his title to the goods acquired is immune from attack by any such creditor on that ground. On the other hand, if the purchaser fails to take the steps prescribed in conformity with the act, the court is required to say as a matter of law that the transaction is tainted by a fraudulent intent, and that the title acquired is open to an attack by a creditor of the seller in the manner provided by the act. *McGreenery v. Murphy* (1912), 76 N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.) 374; *Peck v. Hibben* (1916), 185 Ind. 623, 114 N. E. 216. It is not necessary to speculate on the reasons which prompted the enactment of the statute. It may be that the legislature intended to provide a means available to a purchaser at such sales by which he could protect himself from vexatious litigation by creditors of the seller, and at the same time provide a means by which creditors of the seller might learn or be informed of the proposed sale in time to protect their claims. Whatever may have been the purpose, it is clearly the intent of the act that a compliance with its provisions should make the title acquired by the purchaser secure against attacks by creditors of the seller, and that a failure to so comply should render the transaction fraudulent *per se* and should enable the creditors of the seller to assail the title of the purchaser in the manner provided by the act.

The first step required by the statute of the purchaser is that at least five days before the sale is to be consummated, he shall make a full and detailed inventory of the articles to be purchased, showing quantity and so far as possible in the exercise of reasonable diligence

the cost price to the seller. It is shown by affidavit filed on behalf of appellant that such step was taken in compliance with the act.

The next step required of the purchaser is that he shall demand and receive from the seller a written list of names and addresses of the creditors of the

2. seller with the amount of indebtedness due or owing to each, and certified by the seller under oath to be a full, accurate and complete list of his creditors and of his indebtedness. It is shown by affidavit that at least five days before the sale was consummated a list of creditors was furnished by the seller on demand of the purchaser showing the names of the creditors of the seller and the amount due or owing to each, and that the list furnished was verified by the seller as being a full, accurate and complete list of creditors and of his indebtedness, but that such list did not contain the judgment in favor of plaintiff for \$7,500, and that the purchaser had no knowledge of the existence of such judgment. This constituted a compliance with the second specification of the act, and had appellant complied with the third specification as provided in the act by giving the notice required, its title to the goods purchased would have been secure against attack of any creditor of the seller. This specification requires that the purchaser shall, at least five days before the consummation of the sale, give notice of the proposed sale and of the price, terms and conditions thereof to every creditor whose name and address appears on the list, and to all other creditors of the seller of which he has knowledge. The notice is required to be given to the creditor personally or by registered mail. It appears from the evidence that no notice whatever was given in compliance with the requirement of the act. The failure on the part of the purchaser to give such notice renders the whole transaction fraudulent *per se* as to creditors of

the seller, regardless of the actual good faith of the parties involved. Had appellant given notice to all creditors whose names appeared on the verified list furnished him, his title to the goods purchased could not have been successfully attacked by appellee unless he could have shown that appellant had knowledge of his claim in time to have notified him as a creditor, and this would have been true even though the seller had knowingly and fraudulently omitted his name from the list of creditors. *Glantz v. Gardiner* (1917), 40 R. I. 297, 100 Atl. 913, L. R. A. 1917F 226, 229, and note; *Coach v. Gage* (1914), 70 Ore. 182, 188, 138 Pac. 847. Having failed to comply with the requirement of the statute as to notice, it cannot avail appellant to show that no reference to appellee or his claim appeared on the list of creditors, and that appellant had no notice or knowledge of the existence of such claim prior to the consummation of the purchase. In the light of such facts, it is evident that notice of the proposed sale would not have been given to appellee either personally or by registered mail, even though appellant had complied strictly with the requirement of the statute as to the giving of notice; but it does not necessarily follow that appellee would not have learned of the proposed sale had the required notice been given to the other creditors of the seller. *Stuart v. Elk Horn Bank, etc., Co.* (1916), 123 Ark. 285, 291, 185 S. W. 263, Ann. Cas. 1918A 268. However that may be, the reasons advanced by appellant on this point are sufficiently answered by reference to the statute. The legislature has prescribed such notice as it deemed to be sufficient, and has required that it be given. The statute provides what consequences shall ensue to the purchaser in case the statute is not followed, and by force of the statute the consequences so prescribed will follow a failure to comply with its terms, even though it is made to appear that a compli-



ance with the provisions of the act would have been of no benefit to the complaining creditor, or that the failure to so comply did not operate to his prejudice.

Appellant's affidavits show that after the list of creditors had been furnished, it caused all of the accounts payable, owing by the seller, to be paid out of the purchase money before taking possession, and that arrangements were made for the payment of the outstanding notes of the seller which were satisfactory to the holders of such notes. The statute does not provide that the purchaser shall have the option of giving the notice prescribed or of paying out of the purchase money the claims of the seller's creditors appearing on the list and all others of which he has knowledge. When he takes the latter course, he does not comply with the statute, and he acts at his peril as to any creditors of the seller whose claims may not be included.

The judgment on which this proceeding rests is shown to be based on a disputed claim which is still in litigation. Before the hearing and order in the

3. trial court, a bond had been filed and an appeal had been taken to this court, where the appeal is still pending. It is claimed that the statute under consideration does not apply to a judgment creditor under the circumstances stated. The statute refers in general terms to the creditors of the seller without any exceptions or reservations. The statute does not except from its operation claims which are secured, nor does it except disputed claims which are in litigation. The language being clear, the court has no power to engraft on the statute exceptions which the legislature did not see fit to make. If the statute in its application and operation proves to be harsh or oppressive, relief can be sought only at the hands of the legislature. The courts are powerless in the matter. Appellee was not precluded from resorting to the remedy provided by the

statute because the payment of the judgment, if affirmed, was secured by an appeal bond.

The bond was filed in perfecting a term-time appeal, and it had the effect to stay all proceedings for the enforcement of the judgment during the pendency

4. of the appeal. It is asserted that this proceeding is one brought for the purpose of enforcing the judgment, by means of a receivership, as a claim against the assets in its hands as such receiver. It does not appear from the record that any motion was made in the trial court for an order staying the proceedings during the pendency of the appeal, or that this question was in any other way presented to the trial court and decided. The trial court proceeded no further than to make an order declaring that appellant held the property purchased as receiver and directing it to give bond. By this appeal the authority of the receiver to act further was suspended before the claim of appellee was allowed or any other steps taken to subject the property in the hands of the receiver to the payment of appellee's claim. The appeal bond filed operated to stay all proceedings to enforce the judgment, and there can be no doubt that any attempt, while the appeal was pending, to enforce it against the property in the hands of the receiver would be stayed on proper motion.

Finding no reversible error in the record, the judgment is affirmed.

NOTE.—Reported in 125 N. E. 209.

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BLOMBERG v. STATE OF INDIANA.

[No. 23,569. Filed December 12, 1919.]

**INTOXICATING LIQUORS.**—*Failure to Remove From State.*—An affidavit charging a failure to remove intoxicating liquors from the state within ten days after the enactment of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns 1914, does not

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Blomberg v. State—188 Ind. 619.

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charge a public offense, since the statute does not provide a penalty for the failure to remove it.

From Marion Criminal Court (48,780); *James A. Collins*, Judge.

Prosecution by the State of Indiana against Herman Blomberg. From a judgment of conviction, the defendant appeals.

*Woolen, Cox & Welliver* and *Henry Seyfried*, for appellant.

*Ele Stansbury*, Attorney-General, for the state.

HARVEY, J.—This is a prosecution of appellant for a violation of the prohibitory law of Indiana. Acts 1917 p. 15 *et seq.*, §8356a *et seq.* Burns' Supp. 1918. The prosecution was instituted in the city court of Indianapolis, where appellant was convicted. He appealed to the criminal court of Marion county, where he was tried *de novo* and again convicted. From the judgment of conviction, this appeal is brought.

The prosecution was based upon an affidavit in five counts. A motion to quash the affidavit and each of the counts thereof was filed by defendant, the reasons and causes for quashing being that the facts stated in said affidavit, and in each count thereof, do not constitute a public offense. Said motion was sustained as to the first and fifth counts, and overruled as to the second, third and fourth.

Upon a plea of not guilty, and a plea of former acquittal of the matters charged in counts 2 and 3, the cause was tried by the court without a jury, and the court found that appellant was not guilty as charged in counts 2 and 3, but that he was guilty as charged in the fourth count, and judgment was entered to the effect that appellant be imprisoned in the county jail for ten days and fined in the sum of fifty dollars.

The fourth count was as follows: "Count 4. And

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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affiant aforesaid upon his oath aforesaid says that Herman Blomberg on the 13th day of April, 1918, at and in the county and city aforesaid, did then and there unlawfully fail to remove and cause to be removed, certain intoxicating liquors, to wit: Whiskey, gin, wine and beer then and there in his possession, from this state, within ten days after the second day of April, 1918; that the said defendant was not then and there a licensed pharmacist, wholesale druggist, manufacturing chemist, nor was he then and there in possession of said liquors for or in behalf of a public hospital, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Indiana."

This count does not charge a public offense. The statute does not provide any penalty for failure to remove, as is charged in said count. *Ward v. State* (1919), *ante* 606, 125 N. E. 397.

The motion to quash the fourth count of said affidavit should have been sustained. The judgment of the court below is reversed, with instructions to sustain said motion.

NOTE.—Reported in 125 N. E. 399.

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AETNA TRUST AND SAVINGS COMPANY v. NACKENHORST, RECEIVER, ET AL.

[No. 23,082. Filed March 7, 1919. Rehearing denied December 12, 1919.]

1. RECEIVERS.—*Adjudication of Claims*.—All claims should be filed in the proceeding in which the receiver is appointed, and the priorities and the order of payment determined therein, and not by cross-complaints in an action by the receiver to reduce the fund to his possession. p. 624.
2. MUNICIPAL CORPORATIONS.—*Construction of Sewers*.—*Assignment of Assessment Roll*.—Under §§8711 *et seq.* Burns 1914

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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(Acts 1907 pp. 167, 550, Acts 1909 p. 412), a contractor who has a valid contract with a city for the construction of a sewer can make a valid assignment to a third party of the assessment roll, but the assignee acquires thereby only the contractor's interest in the assessments on the completion of the contract; and, where the contractor abandons the contract, there is no basis for any assessments against the property until the final estimate provided for in the statute can be made, and the assignment is therefore operative or enforceable only for the amount of the final estimate less the costs and expenses of completing the work, such costs being entitled to priority in the distribution of the assets, regardless of whether the work was completed by the city or by reletting the contract or by any other means authorized by law. pp. 630, 631, 635.

3. **ASSIGNMENTS.—*What May be Assigned.***—Personal property and choses in action to be acquired in the future under a valid contract may be assigned, and such assignments, when fairly made for a valuable consideration, are recognized and enforced in equity. p. 630.
4. **ASSIGNMENTS.—*What May be Assigned.***—A mere possibility is not the subject of assignment; the thing assigned must have an actual or a potential existence. p. 630.
5. **ASSIGNMENTS.—*What May be Assigned—Wages.***—If the thing on which an assignment is intended to operate is wages to be earned under an employment, or money to be realized by the performance of a contract, it is essential to the validity of the assignment that the contract be in actual existence at the time the assignment is made. p. 630.
6. **ASSIGNMENTS.—*Operation.***—Where the subject of an equitable assignment is money to be earned in the future, either as wages or by the performance of a contract, such assignment does not become operative until some wages have been earned or something has become payable under the contract. p. 630.
7. **MUNICIPAL CORPORATIONS.—*Sewers.—Construction.—Assignments.***—Where a contractor abandoned the contract for construction of a sewer, and the work was completed by a receiver, an assignee of the assessment roll who acquiesced in the appointment of the receiver and the manner of completing the work, may not question the authority of the receiver nor complain that the cost was greater than would have been necessary had some other plan been pursued in completing the work. p. 633.
8. **MUNICIPAL CORPORATIONS.—*Sewers.—Construction Bond.—Liability.***—The contractor's bond for the construction of a sewer, under §8711 *et seq.* Burns 1914, was for the protection of the property affected, and the surety thereon became liable for

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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- all unpaid claims for labor and materials which entered into the construction of the sewer, but not for money loaned or advanced to the contractor by a third person. p. 633.
9. **MUNICIPAL CORPORATIONS.—Sewers.—Construction.—Rights of Laborers and Materialmen.**—The statute (§§8711 *et seq.* Burns 1914) does not give to persons furnishing material, or to those performing labor, for the construction of a sewer any claim against the city or any lien on the assessments made to pay the costs of the improvement, their only remedy being against the contractor, unless the contractor's bond by its terms inures to their benefit. p. 634.
10. **MUNICIPAL CORPORATIONS.—Sewers.—Construction.—Priority of Claims.**—In the construction of a sewer under §8711 *et seq.* Burns 1914, unpaid claims for material furnished to a contractor who afterwards abandoned the contract have no priority over the claims of a third party who advanced money to the contractor under an equitable assignment of the proceeds of the contract, but are inferior thereto. p. 634.
11. **MUNICIPAL CORPORATIONS.—Sewers.—Construction.—Abandonment of Contract.—Rights of Receiver.**—Where a contractor for the construction of a sewer, under §8711 *et seq.* Burns 1914, abandoned the contract, a receiver appointed to complete the work was entitled to receive from the city the entire proceeds of the contract, less any amount paid to the contractor on certificates issued on partial estimates, and less also the ten per cent. which the city was required under the contract to hold for five years for the purpose of keeping the sewer in repair. p. 634.
12. **RECEIVERS.—Claims.—Priorities.—Construction of Sewers.**—Where a contractor for the construction of a sewer, under §8711 *et seq.* Burns 1914, abandoned the contract, and a receiver was appointed to complete the work, the costs and expenses of completing the work, including the allowance to the receiver and all court costs, were entitled to priority over all other claims. p. 634.

From Marion Superior Court (96,964) *W. W. Thornton*, Judge.

Proceeding by William Nackenhorst, receiver, for the purpose of reducing funds to his possession, in which the Aetna Trust and Savings Company and others filed cross-complaints and asked that their claims be adjudicated. From the decree rendered, the Aetna Trust and Savings Company appeals. *Reversed.*

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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*Ward H. Watson, Sol H. Esarey, John W. Holtzman, Lewis A. Coleman, and William P. Evans, for appellant.*

*Walker & Hollett, and Major A. Downing, for appellee.*

LAIRY, J.—This is an appeal from a decree of the Marion Superior Court. The court made a special finding of facts and pronounced its conclusions of law thereon. Following its conclusions of law the court entered a decree by the terms of which the proceeds arising from the construction of a certain sewer under a contract between the city of Indianapolis and the Julius Keller Construction Company were ordered to be paid out on certain claims presented under the pleadings, the amounts of which were fixed and the priorities of which were determined.

It seems to this court that the proceedings in which the decree was rendered were irregular for the reason that it was entered in a proceeding brought by

1. the receiver for the purpose of reducing the fund to his possession and enjoining the city, in whose hands the funds were, from disposing of them in any other manner. In this proceeding the various persons having claims against the fund filed cross-complaints asking that such claims be adjudicated, their amounts fixed, and their priorities declared. On the issue thus formed the decree referred to was entered. Under proper procedure it would seem that the receiver as the arm of the court appointing him should have reduced the fund to his possession. All claims should have been filed in the proceeding in which the receiver was appointed, and the priorities and the order of payment should have been determined in such proceeding. However, as the regularity of the proceedings is not questioned and as all questions presented on appeal rest on the findings of fact and the conclusions of law based thereon, the

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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questions presented will be determined without reference to the pleadings.

For brevity in stating the substance of the finding of facts, the Equitable Surety Company will be designated as the Surety company, the Aetna Trust and Savings Company will be designated as appellant, the Julius Keller Construction Company will be designated as the Construction company, the city of Indianapolis will be designated as the city, the Indianapolis Mortar and Fuel Company will be designated as the Indianapolis company, and the Cannelton Sewer Pipe Company will be designated as the Cannelton company.

The special findings show the entering into a contract on May 5, 1913, by the city and the Construction company for the construction of the sewer which contained the agreement of the latter "to furnish at their own proper cost and expense all the necessary materials and labor of every description, and to carry out and complete in a good, firm and substantial manner the construction of local sewers with their appurtenances in Schurmann Avenue;" that on May 2, 1913, the Construction company made application for surety bond agreeing that as a part of the consideration for the making of the bond the Surety company should "be subrogated to all of the applicant's rights, privileges and properties as principle and otherwise in said contract, and hereby assigns, transfers, conveys to said company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the applicant at the time of such breach or default that thereafter may become due and payable" on account of the contract; that both prior to the beginning of this action, and since, the Cannelton company and the Indianapolis company made demands of the Surety company to pay for materials sold for and used in the sewer; that on



May 5, 1913, the bond of the Surety company was executed and accepted by the city, conditioned that the Construction company shall fulfill all the conditions and stipulations in its construction contract; that among the specifications contained in the contract were the agreements of the Construction company to pay all moneys due any contractor, materialman or laborer upon such sewer, and that "the contractor shall not be allowed to sublet the whole or any part of the work or make any assignment of the moneys to be paid him, without special permission in writing from the board of works, and, should this permission be violated, the said board may at its option, end and determine his contract;" that on May 5, 1913, the Construction company and the appellant entered into an agreement whereby the former was to execute to the latter an assignment of the assessment roll and the latter agreed to advance the former eighty per cent. of the assessment roll, to be used to pay labor and material bills, such advance to bear seven per cent. from day of advancement until approval of final assessment roll, to be evidenced by memorandum promissory notes, and the latter agreed to take over the assessment roll at ninety-six cents on the dollar in payment of its advances and interest, the assessments against the state and the United States excepted from this contract price; that such assignment was executed on May 5, 1913, authorizing the city comptroller to issue all warrants and bonds in payment of assessment to the appellant, and authorizing the city treasurer to pay the same, which was delivered to the city comptroller prior to May 8, 1913; that on May 5, 1913, the Construction company executed its note for \$2,000 to the appellant for fees and services rendered in procuring the financing of the contract; that, in accordance with the above assignment of contract, sixteen notes were executed for moneys received totaling in amount \$39,000 and provid-

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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ing for payment without relief from valuation and appraisal laws and waiving presentment for payment or protest for nonpayment; that on January 14, 1914, Nackenhorst was, on petition of S. J. Patterson and Company, appointed receiver of the Construction company; that the construction work was not completed and the city notified the Surety company to complete the work, but it refused, and the work was completed by the receiver; that on March 5, 1914, the receiver borrowed \$1,158.69 from appellant; that the sewer was completed and the assessment roll finally adopted by the city on November 18, 1914; that on January 26, 1914, the Cannelton company filed its claim with the city for a balance due of \$3,108.07, with interest at six per cent. thereon from November 3, 1913, for materials furnished and used; that on March 13, 1914, the Indianapolis company likewise filed its claim for \$2,263.95 for materials furnished and used; that on February 11, 1914, the Surety company requested that the Construction company be required to pay all material and labor bills before acceptance of the work as completed; that the work was accepted, and the board of works notified the city comptroller of the approval of the final assessments amounting to \$45,079.13; that upon said notice appeared the following memorandum: "Final estimate was allowed Wm. Nackenhorst, Receiver for the Julius Keller Construction Co., the Equitable Surety Co., as surety, and the Aetna Trust & Savings Co., the assignee of the assessment roll as their interests may appear;" that the appellant did advance eighty per cent. of the assessment roll as agreed; that the Construction company used \$33,692.49 in payment of labor and material bills upon the sewer, and the balance of the advancement was not so used, but no evidence was presented to show that the appellant knew that fact; that the Cannelton company and the Indianapolis company each furnished the mate-

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*Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.*

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rials to the amounts set out in their claims which were unpaid; that the Surety company is now the owner of the Indianapolis company's claim by assignment; that the further sum of \$2,117.19 was advanced to the Construction company to pay the premiums for public and employer liability insurance, \$221.50 of which was used on the Twenty-sixth street sewer and \$1,895.69 upon the Schurmann avenue sewer, which was included in the sum \$33,692.49 previously mentioned; that the Construction company paid to the appellant a total of \$533.56 on insurance premiums, and \$86.94 interest on the \$2,000 note of May 5, 1913; that the president of the Construction company represented to the representative of the appellant that they had funds sufficient to pay all bills except the Indianapolis company; that ninety-six per cent. of the assessment roll is \$43,275.96, and the advances made by the appellant to the Construction company are \$2,935.64 in excess of the \$43,275.96; that the city refused at first to accept the sewer under the contract until all material bills were paid, but later, upon the receiver's petition, agreed to accept the work and hold the money until all bills were paid or an order for distribution made by a court of competent jurisdiction; that the receiver expended \$50 to employ an engineer to assist in making the settlement; that the receiver was directed by order of court to accept \$45,283.13, the amount of the contract price, less \$204 retained by the city to pay inspection charges, in full settlement; that, in addition to the \$33,692.49 actually expended by the Construction company, it contracted for and used materials to the value of \$5,324.11, for which no payment was made; that an estimate was allowed to the Surety company and appellant, as their interest might appear, in the sum of \$45,283.13, it being the agreed consideration under the terms of the contract for the construction of the work as adjusted, modified

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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and completed by the receiver under orders of the Marion Superior Court wherein said receivership was pending; that the insurance premiums were paid from the \$41,000 of notes above referred to; and that the receiver and his attorneys have performed services to the amount of \$2,500.

The court concluded that the city was entitled to retain \$4,507.91 of the \$45,079.13 under its contract; that the appellant should recover of the Construction company \$46,817.93, of which \$34,275.12 (for moneys advanced with interest) is preferred to all other creditors, and from the receiver \$2,664.08, which is preferred to all claims except costs of administration, or a total of \$37,939.20 preferred, and \$12,542.81 general claims; that the Cannelton company is entitled to \$3,459.40, and the Surety company to \$2,368.68, by assignment from the Indianapolis company, making a total of \$5,828.08 to be paid next after the \$34,275.12 of appellant; that the receiver is entitled to be paid \$2,550 for services of an engineer, attorneys and himself, together with costs herein, which shall be preferred to all creditors; that the receiver is entitled to receive at once from the city whatever it has in its possession derived from the assessment for the construction of the sewer less the amount held by it as a guarantee fund, and that the city be perpetually enjoined from delivering the final assessment roll to appellant. The judgment of the trial court follows its conclusions of law.

The contention of appellant is that it was and is the sole and exclusive owner of the assessment roll, a *bona fide* purchaser for value, and therefore no one other than appellant could have any interest therein, except the city in ten per cent. thereof as a guarantee fund. Upon this contention is based all of appellant's assignments of error.

It is apparent from the reading of the sections of the

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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statutes in relation to the construction of sewers (§§8711-8725 Burns 1914; Acts 1907 pp. 167, 550,

2. Acts 1909 p. 412) that the legislative intent is to give to the contractor or person performing the contract for the construction of a sewer or street improvement a lien against the property assessed for the amount of the assessment as shown by the assessment roll made after the completion of the contract and filed with the department of finance of the city, which lien is assignable. However, there is also expressed a legislative intent to give such a lien only after the work is completed and the assessments made, but the statute contains provisions giving the contractor a right to a monthly estimate and certificate for sixty-five per cent. of the work completed and a final estimate only upon completion and acceptance of the improvement. These certificates are made negotiable as inland bills of exchange. §8711 Burns 1914, *supra*. The assignment to appellant of the assessment roll was an assignment of the contractor's interest in the assessments when they should come into existence by virtue of the completion of the contract. The assignment was made upon a valid consideration after the contractor had entered into a valid and binding contract with the city.

Personal property and choses in action to be acquired in the future under a valid contract may be assigned,

and such assignments, when fairly made for a valuable consideration, are recognized and enforced in equity. Pomeroy, Eq. Jurisp. (3d. ed.)

3. §1288; *Godwin v. Murchison* (1907), 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935. A

4. mere possibility is not the subject of assignment; it is essential that the thing assigned must have

5. an actual or a potential existence. *Kane v. Clough* (1877), 36 Mich. 436, 24 Am. Rep. 599;

6. *Low v. Pew* (1871), 108 Mass. 347, 11 Am. Rep. 357,

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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359. If the thing on which the assignment is intended to operate is wages to be earned under an employment, or money to be realized by the performance of a contract, it is essential to the validity of the assignment that the contract should be in actual existence at the time the assignment is made. *Walton v. Horkan* (1900), 112 Ga. 814, 38 S. E. 105, 81 Am. St. 77, 79. Where the subject of an equitable assignment is money to be earned in the future, either as wages or by the performance of a contract, such assignment does not become operative until some wages have been earned or something has become payable under the contract. Nothing can be claimed under such an assignment until conditions have arisen which would have enabled the assignor to assert a claim successfully in the absence of such assignment. *Kintz v. Scully Steel, etc., Co.* (1915), 184 Ind. 169, 171, 110 N. E. 986; *Warren v. First Nat. Bank* (1893), 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746, 750; *Cooper v. Douglass* (1864), 44 Barb. (N. Y.) 409, 417.

The subject of the assignment under consideration in this case was the assessments to be made on the completion and acceptance of the sewer contract.

2. At the time the assignment was made there were no assessments in existence, and none could be made under the law unless and until the work of constructing the sewer should be completed and accepted. During the progress of the work the assignor had a right, under the statute, to have partial estimates made and to have issued negotiable certificates to an amount equal to sixty-five per cent. of such partial estimates; and on completion and acceptance of the entire work he had a right to receive a final estimate. The assignee could not successfully assert any claim to any amount not shown to be payable to the assignor either on a partial or final estimate. The record shows that the as-

signor abandoned the contract before it was completed. Under such conditions there was no basis for any assessments against the property, as no final estimate could be made until the work was completed and accepted. Upon completion of the work the final estimate became available, but the amount available to the contractor would be the final estimate less the costs and expenses of completing the work. The primary and only purpose of levying assessments against property under the provisions of the statute is to provide a fund to pay the costs and expenses of the work constructed. This litigation arises over the distribution of the amount shown to be due on the final estimate after the work had been completed by a receiver appointed by the Marion Superior Court. Appellant as assignee of the proceeds of the contract cannot successfully assert a right to anything which did not become available to its assignor under the contract with the city. As the costs and expenses of completing the work after it had been abandoned by the Construction company must be deducted from the final estimate before anything could be available to the Construction company, it becomes apparent that its assignment to appellant would not be operative or enforceable for an amount greater than the final estimate less the costs and expenses of completing the work. The incompleting work at the time the contract was abandoned by appellant's assignor afforded no basis for an assignment against property. The completion of the work was required in order that the inchoate interests might be lifted up and placed on a property basis. The cost of thus completing the work must be given first place in this distribution of the assets, regardless of whether such work was done by the city directly or by reletting the contract or by any other means authorized by law.

Under the facts involved here, a receiver was ap-

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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pointed for the defaulting contractor and he finished the work under the orders of the court appointing

7. him. The record does not show, and it cannot be assumed, that appellant was ignorant of the failure of its assignor to complete the work and of the appointment of a receiver, or that the work was carried forward to completion by such receiver without the knowledge of appellant. The record does not show that appellant made any objection to the work being completed in the manner stated. Having acquiesced in what was done and having received the benefits, appellant is in no position to question the authority of the receiver or to complain that the cost of completion was greater than it would have been had some other plan been pursued to complete the work.

It has been suggested that appellant, as the assignor of the contract, should be awarded the entire proceeds of the contract if necessary to repay it for money

8. loaned on the faith of the assignment, whether the entire proceeds were earned by the contractor or not, and that the cost of completing the unfinished work after it was abandoned by the contractor should fall on the surety on the contractor's bond. It must be remembered that the bond of the contractor was given to the city for the protection of property to be affected by the improvement and to be assessed for its construction. In making the contract and in accepting the bond, the city was acting as an enforced agent of the property owners to be affected by the improvement. As surety on the contractor's bond the Surety company undertook to indemnify the city for any loss sustained by reason of the failure of the contractor to complete the work according to its contract. By the very terms of the contract and bond, the Surety company became liable for all unpaid claims for labor and materials which entered into the construction of the sewer; but it was not



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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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liable under the law or under the contract and bond for money loaned or advanced to the contractor by a third person.

The statute does not give to persons furnishing material for the construction of a sewer, or to those performing labor thereon, any claim against the city

9. or any lien on the assessments made to pay the cost and expenses of the improvement. Their only remedy is against the contractor, unless the

10. bond given by the contractor by its terms inures to their benefit, in which event they may resort to the bond. Unpaid claims for material furnished to the contractor before he abandoned the work have no priority over the claims of appellant under the equitable assignment of the proceeds of the contract, but are inferior thereto.

The receiver is entitled to receive from the city the entire proceeds of the contract, less any amount that may have been paid the contractor on certificates

11. issued on partial estimates, and less also the ten per cent. which the contract provides shall be retained by the city for five years for the purpose of keeping the sewer in repair.

The costs and expenses of completing the work after its abandonment by the Construction company, including the allowance to the receiver and all court

12. costs, should be given priority over all other claims. *National Surety Co. v. Maag* (1908), 43 Ind. App. 16, 86 N. E. 862.

The balance due under the contract, including any amount may be ultimately due from the city out of the fund retained for repair of the sewer, passed to appellant under its assignment, free from any claims in favor of persons furnishing material or labor, and should be ordered paid subject only to the priority of the costs of completing the work, including money borrowed by the

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*Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.*

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receiver for that purpose and the court costs and receiver's allowance.

The court erred in its conclusions of law, and the judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law in conformity with the rules stated in this opinion.

Myers, J., and Harvey, C. J., concur in the reversal, but do not agree with the reasoning or with the result reached.

#### ON PETITION FOR REHEARING.

LAIRY, J.—The original opinion holds that unpaid claims for material furnished to the contractor before it abandoned the work had no priority over the claim of appellant under its equitable assignment of the proceeds of the contract. The writer of the opinion entertained some doubt as to the correctness of this statement at the time of the adoption of the opinion by the court, and, from subsequent consideration and investigation, the doubt has ripened into a conviction that the rule thus announced is erroneous.

The opinion holds that appellant's rights under the equitable assignment of the prospective assessments were such only as could have been asserted by his

2. assignor in case no assignment had been made.

In order to entitle the contractor to a final estimate, it was necessary that the work should be completed and accepted by the city. If he failed to complete the contract, he would be entitled in equity to receive only the balance of the proceeds of the assessments after deducting the amount of all costs and expenses incident to the completion of the work to be done under the contract and the amount of all unpaid claims for labor and material which entered into its construction. Appellant took the assignment of the proceeds of the contract subject to all equitable defenses. *Rosenthal*

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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v. *Rambo* (1905), 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; *Copeland v. Manton* (1872), 22 Ohio St. 398; *Hardaway v. National Surety Co.* (1908), 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321.

By the appointment of a receiver the whole controversy was drawn within the jurisdiction of a court of equity. In a court of equity having jurisdiction to declare priorities and to order a distribution of the proceeds of the contract, the rights of the assignee of such proceeds were the same that those of the assignor would have been in case no assignment had been made. If the contractor had been in court, and had been insisting on an order directing the proceeds to be turned over to him in preference to the unpaid claims allowed by the court for labor and material which entered into the construction of the work, I think there can be little doubt that the claims for such materials would be entitled to priority of payment.

For the reasons stated, I am of the opinion that the unpaid claims for materials furnished to the contractor prior to the time he abandoned the contract are entitled to preference over the claims of appellant under the equitable assignment of the proceeds of the contract.

While I vote to deny the petition for rehearing in preference to adopting the views expressed in the dissenting opinion, I do so with the mental reservation herein expressed. I have an abiding conviction that the original opinion should be modified in the manner indicated. None of the other members of the court agree that it should be so modified.

#### SEPARATE OPINION.

HARVEY, J.—I agree with the prevailing opinion wherein it holds that the superior court erred in requiring that out of the assessment roll should be paid two claims for materials purchased by the contractor for

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*Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.*

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use in the construction of the sewer in question. It has been expressly held in the decisions cited that claims for materials and labor are not liens upon or chargeable against the fund raised by the assessment. Such claimants must seek payment from the contractor or his surety.

The superior court was doubly wrong in allowing payment out of the assessments to the surety of an amount the surety had paid out in a pretended purchase of one of these material accounts, because: first, such account was not chargeable against the assessment roll; and, second, the surety was liable therefor directly, and had no right as against others having equities in the fund to buy this claim and assert a prior equity securing its payment.

I cannot agree, however, that the prevailing opinion is correct in allowing as prior to the claim of appellant for money advanced on faith and security of the assessment roll the amount the receiver borrowed for use in completing the contractor's work, or in allowing priority to the costs and expenses of the receivership. While it is a fact that the receiver borrowed from appellant the sum needed and used in completing the work, and the superior court ordered that the sum so borrowed be repaid to appellant as a prior claim, it may seem on first impression to matter little, in dollars and cents, to appellant that this sum is deducted from the assessment, as it is paid to appellant after such deduction; but appellant loaned the total amount of the assessment roll, and in addition thereto loaned the amount needed to complete, and is entitled to recover both sums, and its equities as to both should be considered. If the contractor had purchased the amount of material and labor necessary to complete his contract, and had not paid therefor, there can be no doubt that his surety would have been directly liable therefor and the assessment

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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roll would not have been chargeable therewith. What equity protects the surety at the expense of one having an existing and valid lien on the assessment roll, where the only difference is that the receiver who is attending to the affairs of the contractor purchases the material and labor? Existing liens on property coming into the hands of a receiver are not so easily displaced or destroyed.

This is a proceeding in equity, and the result sought is a marshalling of priorities and the application of a certain fund in accord with equity. As shown by the prevailing opinion, the amount derived by assessment for sewer construction primarily constitutes the fund. The relations of the parties to this fund were originally such that the contractor would be entitled thereto under his contract. To mature his said right thereto he must perform his contract, including payment of all expenses of labor and material. Thus far his rights and obligations are rights at law. He abandoned the work. Out of this failure no equities grow in his favor. He filed bond securing such performance. The surety on this bond then became bound at law in some manner to make good the default. Such a surety is not a favorite at law or in equity. It received compensation it deemed sufficient to protect it in the event of liability on the bond.

In this case the surety refused on demand of the city to do anything. This did not add to its equities. It was expressly obligated to pay material and labor claims. This it refused to do. In an effort to save itself from one such claim it purchased the same, and asserted that it thereby was entitled, as against all others interested, to an allowance of this claim. No equity arises in its favor out of this attempted evasion of its legal obligation. If it had performed its obligation, this litigation and receivership would have been

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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avoided. No allowance for services of the receiver or his attorney could have been asked or made. No equity arises in its favor out of its conduct, indirectly causing this expense. Therefore, as the surety was obligated to so act as to avoid such expense, the receiver should have called upon the surety for funds to complete the contract and pay the expenses of the receivership. Equity to others demanded this, and a court of equity, having jurisdiction of all parties, should have required that the receiver collect from the surety this expense, because of its default, and the default of its principal, the contractor. In all this there is not the slightest suggestion of an equity in favor of the surety. So much for the equities of the contractor and its surety.

The city is a party to this proceeding. It is not involved at this stage, except as a stakeholder, ready to pay the right party, or to pay to the court of equity, that the court may distribute to the right party. The material claimants are parties, but they have legal remedies against the surety, and have no claims, legal or equitable, to the fund. The only other party is the Aetna Trust Company. It was induced to loan money to the contractor by the fact that a legal contract had been made between the city and the contractor, the performance of which was secured by a bond. The payment of all material and labor claims necessary to completion was secured by the bond. This was assurance that the sewer would be completed, and that the city would resort to the bond in event of default by the contractor, or that the city would complete the sewer, or cause it to be completed, at the expense of the contractor or his surety. Thus an assessment roll and the collection thereof was assured, and the statute in force when this contract was made created a lien upon the property affected at the date of the contract. Acts 1905 p. 236, §108, §8711 Burns 1914.

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Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.

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If, by reason of defaults and refusals of the contractor and his surety, a court of equity took jurisdiction, the exercise of its powers would bring completion at the expense of those obligated for the expense thereof. If the cost of completion exceed the contract price, the contractor or his surety must furnish the excess. Induced by all these provisions, the Aetna Trust Company agreed to and did take an assignment of the prospective assessment roll as security. The Aetna company advanced all it agreed to and more. It defaulted in nothing. It did not become an assignee of the contract, or assume any obligations thereunder, and neither law nor equity imposes any such obligation. It took the beneficial results of performance which others were obligated to complete.

It might have resisted, as might others, the appointment of a receiver, because an ample legal remedy existed in the city to cause completion at the expense of the surety. There may have been need, however, for a receiver, because neither the city, nor the contractor, nor his surety would move or act toward completion. The assignee of the roll waived nothing by allowing a court of equity to undertake working out the duties, obligations and equities of all parties. It had a right to anticipate that a court of equity would so do at the expense of those obligated therefor, and that the court would use its powers to bring in from such obligated parties the expense of so doing. When all this is considered, where does equity range the rights and priorities of the surety and the Aetna Trust Company? That is the only question here. The defaulting surety cannot stand on the same plane, as to any part of the Aetna company's advancement, with the Aetna company, which company has defaulted in nothing.

The prevailing opinion holds that in any event the

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*Aetna Trust, etc., Co. v. Nackenhorst, Rec.—188 Ind. 621.*

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surety could only be held for that part of the expense of completion which the assessment did not pay, hence the assessments must be first applied to completion, though this damages the Aetna company's security. This might well be true if the contractor and the surety were the only parties interested in the application of the assessments; but it cannot be true where another has in good faith, and for a consideration which moved to the use and benefit of the contractor and his surety, taken as security the assessment roll.

The prevailing opinion admits that the assignee of an anticipated assessment roll takes an equitable interest, but states that this amounts to nothing except as ripened by performance of the contract. Such an equitable interest included a right to the protection of performance by those obligated thereto. The surety became responsible for the completion, and thus for the ripening of the equitable rights of the assignee, and cannot take advantage of its own wrong in failing to cause completion, and assert that its own default having prevented the assignee's rights from ripening, the assignee must suffer and the surety benefit.

Therefore I am of opinion that the trial court also erred in protecting the surety by requiring that the amount borrowed by the receiver be paid out of the assignee's assessments, and in requiring that the costs of the receivership be paid out of the assessments.

The reversal of the decree is approved, but the mandate should be that the total amount of the assessments be paid over to appellant, less the inspection charges, and including that to be released by the city at the end of the guaranty period, and, further, that the receiver be directed to proceed against the surety for the amount expended in completion, and the costs of the receiver-



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Tolleston Club, etc. v. Carson—188 Ind. 642.

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ship, and, when collected, the amount advanced by appellant to the receiver should be repaid.

Myers, J., concurs herein with Harvey, J.

NOTE.—Reported in 122 N. E. 421, 125 N. E. 213, 123 N. E. 353.

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TOLLESTON CLUB OF CHICAGO ET AL. v. CARSON.

[No. 22,692. Filed April 24, 1919. Rehearing denied December 16, 1919.]

1. **QUIETING TITLE.**—*Right to Relief.*—In suits to quiet title the plaintiff must recover, if at all, on the strength of his own title. p. 651.
2. **WATERS AND WATERCOURSES.**—*Swamp Lands and Lakes.*—*Boundaries.*—*Meander Lines.*—Where a conveyance describes lands bordering on nonnavigable waters such as lakes or swamps of circular or irregular form, the doctrine of riparian ownership, which applies to conveyances of lands bounded by nonnavigable streams, has no application, but the submerged land is treated as surveyed and the lines of the survey of the border lot, unless otherwise indicated, are regarded as protracted across the water so as to include, as *part of the grant* thereof, the title to the submerged land to the limits of the subdivision within the lines so protracted, even though the title of the abutting owner is extended beyond the center of the water or to the opposite shore. pp. 653, 654.
3. **COURTS.**—*Stare Decisis.*—*Boundaries.*—The rule that a conveyance of land bounded by a lake or swamp of circular or irregular form carries title to submerged land within the limits of the subdivision described in the conveyance, though open to criticism, will be followed under the doctrine of *stare decisis*. p. 655.
4. **WATERS AND WATERCOURSES.**—*Boundaries.*—*Intention of Parties.*—Where it is apparent that the parties to a conveyance to land adjoining nonnavigable waters intended the meander line as a boundary limiting the extent of the grant, the intention of the parties will control. p. 657.
5. **PUBLIC LANDS.**—*Title Under Patent.*—*Meander Lines.*—A grant by the state of land under the act of 1852 (1 R. S. 1852 p. 471), providing for the sale and reclamation of swamp lands, conveys only the surveyed portion above the meander line, since a grant of public land, being purely statutory, must be construed with reference to the statute under which it is made.

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Tolleston Club, etc. v. Carson—188 Ind. 642.

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(*Tolleston Club, etc., v. State*, 141 Ind. 197, distinguished and overruled in part.) pp. 657, 658.

From the Porter Superior Court; *Harry B. Tuthill*, Judge.

Action by Isabella Carson against the Tolleston Club of Chicago, Amos W. Walker and others. From a judgment for the plaintiff, the named defendants appeal. *Reversed.*

*Randall W. Burns, John H. Gillett, Gerald A. Gillett, Fred Barnett*, for appellants.

*Peter Crumpacker, Fred C. Crumpacker and Charles T. Crumpacker*, for appellee.

LAIRY, J.—Appellee, Isabella Carson, brought this action against appellants, the Tolleston Club of Chicago, Amos W. Walker, and many others, the purpose being to quiet her title to certain lands described by metes and bounds in section 17, township 36 north, range 8 west, in Lake county, Indiana. All of the defendants defaulted except the Tolleston Club and Walker. A trial on the issues formed resulted in a verdict and judgment, to reverse which this appeal is prosecuted.

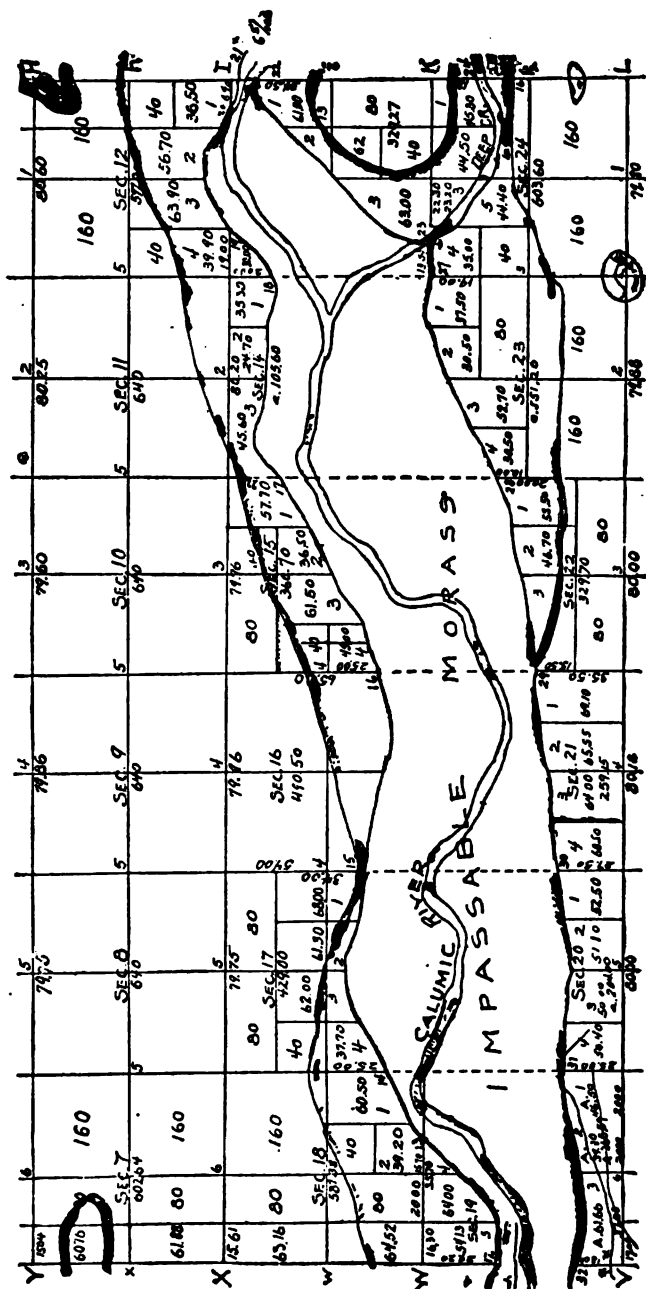
In order to convey a clear understanding of the questions involved it is necessary to make a statement showing the source of the conflicting claims of title.

In 1834 and 1835 the government of the United States caused a survey of township 36 north, range 8 west, in the State of Indiana. The Calumet river flows across the township from east to west a little north of the center. At the time of the survey there was a marsh on both sides of the current, a large part of which was covered by water and which was designated on the plat as an "impassable morass." The plat of the survey shows meander lines run on both sides of the river bordering the "impassable morass," the distances between the meander lines in sections 17 and 20 being over one

mile. Outside the meander lines the section lines, both north and south and east and west, are shown on the plat by solid black lines, and the subdivision of the sections into quarters is shown by similar lines. The north and south section lines are shown on the plat by dotted lines extending across the "impassable morass" between the meander lines, but the east and west section lines which would lie between the meander lines are not shown. A large part of the south half of section 17 in which the land in controversy lies is south of the north meander line. The plat shows that the part of section 17 lying north of the meander line was subdivided. The north half of the northeast quarter and the north half of the northwest quarter are shown as 80-acre tracts, and the southwest quarter of the northwest quarter is shown as a 40-acre tract. The southeast quarter of the northeast quarter and that part of the northeast quarter of the southeast quarter lying north of the meander line was indicated on the plat as lot 1, containing sixty-eight acres. The southwest quarter of the northeast quarter and that part of the northwest quarter of the southeast quarter lying north of the meander line was indicated on the plat as lot 2, containing 61.30 acres. The southeast quarter of the northwest quarter and that part of the northeast quarter of the southwest quarter lying north of the meander line was indicated in the plat as lot 3, containing sixty-two acres. The parts of the northwest quarter of the southwest quarter and the southwest quarter of the southwest quarter lying north of the meander line constitutes lot 4, as indicated on the plat. A copy of the map of the government survey, covering section 17 and other sections contiguous to the marsh is set out for reference. See pages 645, 648.

The State of Indiana acquired title to all or a part of said section 17 under an act of Congress approved Sep-

Tolleston Club, etc. v. Carson—188 Ind. 642.



tember 28, 1850, known as the Swamp Land Act. The patent evidencing such grant is as follows:

"Whereas, by the act of Congress approved September 28, 1850, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' it is provided that all the swamp and overflowed lands, made unfit thereby for cultivation within the State of Indiana, which remained unsold at the passage of said act, shall be granted to said state; and, whereas, in pursuance of instructions from the General Land Office of the United States, the several tracts or parcels of land hereinafter described have been selected as swamp and overflowed lands, inuring to the said state, under the act aforesaid, being situate in the district of lands subject to sale at Winamac, Indiana, to wit: Whole of sections two, three, six, seven, eight, nine, ten and eleven. The whole of fractional sections twelve, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one and twenty-two (here follows the description of many additional tracts of lands not included in this controversy) all in township thirty-six north of range eight west, containing in all eleven thousand, three hundred and three acres, and thirty-nine hundredths of an acre, according to the official plats of survey of the lands returned to the General Land Office, by the Surveyor General, and for which the Governor of the said state of Indiana, did on the eighteenth day of December, one thousand, eight hundred and fifty-two request a patent to be issued to the said state, as required in the aforesaid act.

"Now, therefore, know ye, that the United States of America, in consideration of the premises, and in conformity with the act of Congress, have given and granted, and by these presents do give and grant, unto the said state of Indiana, in fee simple subject to the disposal of the Legislature thereof, the tracts of land above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said state of Indiana, in fee simple and to its assigns forever."

In 1856 the State of Indiana granted to Aaron N.

Hart, by separate patents, the following described tracts of land in said section 17, to wit: The northwest quarter of the northwest quarter; the southwest quarter of the northwest quarter; lot 2 in said section containing 61.30 acres; lot 3 in said section containing sixty-two acres; and lot 4 in said section containing 37.70 acres. Appellee claims the land in controversy under a deed to parts of lot 2 and lot 3, tracing her chain of title through mesne conveyances to Aaron N. Hart.

In 1870 the Congress of the United States passed an act which, after reciting by way of preamble that there was at the time lying along the banks of the Little Calumet river in the counties of Porter and Lake in the State of Indiana a body of lands supposed to contain about 4,000 acres, which had never been sold or surveyed and which was described in the original government survey as an impassable morass, and after further reciting in the preamble that the Calumet Drainage Company had been organized under the laws of the State of Indiana for the purpose of draining the valley of said river, including the impassable morass, provided that said unsold land should be subject to a lien under the laws of Indiana for the proper proportion of the costs of such drainage, and further provided by §2 of the act that said lands might be surveyed and sold to the highest bidder under the directions of the Secretary of the Interior subject to such lien.

In 1872 the United States government caused the lands lying between the meander lines in township 36 north, range 8 west, to be surveyed for the purpose of sale under the provisions of the act to which reference has been made. That part of the south one-half of section 17 lying south of the meander line was mostly included in lot 5 and lot 6 as shown by the plat of this survey, a copy of which is set out for reference.



The Tolleston Club claims title to the lands in controversy lying south of the north meander line, basing its claim on deeds under a chain of title originating in patents issued by the government of the United States under the last survey.

The tract of land in controversy is described by metes and bounds as follows: Beginning at a point in the middle of the north line of lot 2 in said section; thence south on a line parallel with the north and south middle line of said section to the south line thereof; thence west to said north and south center line of said section; thence north along said center line to the northwest corner of said lot 2; thence east to the place of beginning. Also, commencing at a point 591.1 feet east of the southwest corner of the northeast quarter of the northwest quarter of said section; running thence east to the northeast corner of lot 3 as surveyed and designated by the United States government in said section; thence south along the east line of said lot 3 to the south line of said section 17; thence west along said south line to a point due south of the place of beginning; thence north to the place of beginning.

Appellee claims title to the land south of the meander line on the theory that the entire section was covered by the original government survey of 1834, and that no part of the section was excluded or left unsurveyed; that the title of the United States government passed to the State of Indiana under the patent heretofore set out, and that the sale of lot 2 and lot 3 by the state to Aaron N. Hart conveyed not only the high land north of the meander line, but also the submerged land lying south thereof within the subdivision of the section.

The Tolleston Club makes no claim to the land described north of the meander line; but, as to that part of the land south of the meander line included in the description, it asserts title on two grounds: First, it



claims a record title to the lots laid off by the government in 1872, within the meander lines through a chain of conveyances extending back to the United States government; and, second, it claims title by adverse possession under color of title for more than twenty years.

The title claimed by appellant Walker is based on a quitclaim deed dated in 1896 by which James Carson and Isabella Carson, his wife, conveys to Amos W. Walker—

“all interest in the following described real estate to wit: An undivided interest amounting to Five (5) acres in the North Half ( $N\frac{1}{2}$ ) of the Northwest Quarter ( $N. W. \frac{1}{4}$ ) and the Southwest Quarter ( $S. W. \frac{1}{4}$ ) of the Northwest Quarter ( $N. W. \frac{1}{4}$ ) and Lot Three (3) and Four (4) and the West Thirty ( $W. 30$ ) and Thirty One-hundredths ( $30/100$ ) acres of Lot Number Two (2) all in Section Seventeen (17), Township Thirty-six (36) North, Range Eight (8) situated in the county of Lake in the State of Indiana.”

James Carson was at the time of the conveyance the owner of an undivided interest in the land described as a tenant in common with others, and appellant Walker claims that under the description contained in the deed all of the interest of James Carson in the lands described therein passed to him, and that the lands subsequently set off to Carson in severalty under the partition proceeding, which was pending at the date of the deed, vested in him under and by virtue of said conveyance. He asserts that the subsequent conveyance from James Carson to Isabella Carson conveyed no title to the real estate in controversy, and that he owns the same in fee simple. He also bases a claim to the land on a tax deed. In the trial court, appellant Walker sought affirmative relief by cross-complaints asking that his title be quieted.

It is thus seen that appellant Walker and appellee, Isabella Carson, both derive title from the same source, the controversy between them arising over the construction of the quitclaim deed executed by James Carson and wife to Walker. Appellant Tolleston Club claims that part of the land described lying south of the north meander line as against both Isabella Carson and appellant Walker.

In suits to quiet title the plaintiff must recover, if at all, on the strength of his own title. The evidence must show title in the plaintiff; it is not sufficient

1. that it shows that the adverse claimant is without title. *Brady v. Gregory* (1911), 49 Ind. App. 355, 358, 97 N. E. 452; *Howard v. Twibell* (1913), 179 Ind. 67, 69, 100 N. E. 372, Ann. Cas. 1915C 93. If Isabella Carson has a record title to that part of land described lying south of the meander line, such title is derived through a grant from the State of Indiana covering that part of the land described. Appellant Tolleston Club asserts that the state, at the time of such grant, had no title to the land in section 17, lying south of the north meander line, for the reason, as asserted, that the land between the meander lines shown on the plat made by the government was not surveyed and did not pass from the United States government to the state under the swamp land grant and the patent made thereunder. It is not controverted, however, that the title to lots 2 and 3 lying north of the meander line and containing, respectively, 61.30 acres and sixty-two acres passed to the state under the swamp land grant whether the land in section 17 south of the meander line passed by such grant or not. If it be held that the grant made by the state to the remote grantor of appellee, Isabella Carson, for lots 2 and 3 as shown on the government plat included only the land within the lines bounding those lots as indicated on the plat, and that the meander line

marked the southern boundary of such grants, it will then be apparent that so far as the title of appellee is concerned, it can make no difference whether the title to the land south of the meander line in section 17 passed to the state under the swamp land grant or whether it remained in the United States government.

Appellee asserts that the meander line as shown on the plat of the government survey was not the southern boundary line of lots 2 and 3 and that it was intended only as a line separating the salable land within the lot from that which was unsalable south of the meander line of the subdivision of which the lot formed a part. It is asserted that when the salable land north of the meander line was sold and granted by the state, the patent carried the title to the submerged land beyond the meander line to the limits of the subdivision. As sustaining this position appellee relies on numerous cases decided by this court. *Stoner v. Rice* (1889), 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387; *Brophy v. Richeson* (1894), 137 Ind. 114, 36 N. E. 424; *Tolleston Club, etc. v. State* (1895), 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Kean v. Roby* (1896), 145 Ind. 221, 42 N. E. 1011; *Tolleston Club, etc. v. Clough* (1896), 146 Ind. 93, 43 N. E. 647; *Mason v. Calumet Canal, etc., Co.* (1898), 150 Ind. 699, 50 N. E. 85; *Gary Land Co. v. Griesel* (1912), 179 Ind. 204, 100 N. E. 673.

The cases in this state prior to *Stoner v. Rice, supra*, are not entirely consistent with each other, and some of those cases cannot be reconciled with the cases following *Stoner v. Rice, supra*. The case of *Ross v. Faust* (1876), 54 Ind. 471, 23 Am. St. 655, was an action of trespass against the defendant for removing gravel from the bed of White river, the plaintiff being the owner of a lot of land on the bank. In making the survey the government surveyor indicated a meander line on the bank of the river following the sinuosities there-

of, and it was held that such line did not mark the limit of the grant. It was further held that the stream was the boundary, and that, being nonnavigable, the title of plaintiff extended beyond the meander line on the bank to the thread of the current. The decision in this case was based on the riparian rights of the plaintiff, and it has been followed consistently by all of the later cases in this state which involves the strict application of the doctrine of riparian ownership. *Sphung v. Moore* (1889), 120 Ind. 352, 22 N. E. 319; *Sizor v. City of Logansport* (1898), 151 Ind. 626, 50 N. E. 377, 44 L. R. A. 814; *Leonard v. Wood* (1903), 33 Ind. App. 83, 70 N. E. 827; *Illyes v. White River Light, etc., Co.* (1910), 175 Ind. 118, 93 N. E. 670.

Where the meander line borders the banks of a river or other narrow body of water the rule stated in *Ross v. Faust, supra*, can generally be applied without

2. difficulty; but where it borders a large lake or swamp of a circular or irregular form the application of the rule is not so simple, and, in disposing of cases in which such conditions were presented, the court encountered difficulties, as appears from the decisions hereafter cited in this opinion. In cases where it appeared that lakes or other nonnavigable waters of circular or irregular shapes were meandered, and bordering lots on all sides were owned by different persons, it became manifest that the title of each adjoining proprietor could not extend to the center of the body of water without overlapping. When such a condition was encountered it was first held that title of the owner of the border lot extended to the middle of the lake if within the boundary of the subdivision of which the lot formed a part. *Ridgway v. Ludlow* (1877), 58 Ind. 248. In *State v. Portsmouth Savings Bank* (1886), 106 Ind. 435, 7 N. E. 379, it was held that the owners of rim lots bordering on a lake could not claim title be-

yond the limits of the subdivisions of which the lots were a part. In these cases the title of the owner of the border lot to lands beyond the meander line or under the body of water seems to be based on the doctrine of riparian ownership, with the limitation that the title of the riparian owner could not extend beyond the limits of the subdivision of which the border lot formed a part.

The only case decided prior to *Stoner v. Rice*, *supra*, which is not in line with the foregoing decisions, is that of *Edwards v. Ogle* (1881), 76 Ind. 302. Under the facts peculiar to that case, the court held that the owner of the border lot, laid off by the Squibbs survey, took only to the meander line.

The case of *Stoner v. Rice*, *supra*, is a departure from the earlier cases, and the decision rests on a basis entirely different. The doctrine of riparian own-

2. ership is abandoned. The land lying under the body of water is treated as surveyed, and the lines of the survey are regarded as being protracted across the water so as to fill out the subdivisions lying on the bank. Unless otherwise indicated, the grant of a border lot carries with it, *as a part of the grant*, the title to the submerged land to the limits of the subdivision within the lines so protracted. Under this rule as developed by later decisions, the title of an abutting owner may extend beyond the center of the water, and may even include land on the opposite side. *Gary Land Co. v. Griesel*, *supra*.

The case of *Stoner v. Rice*, *supra*, was criticized in the case of *Hardin v. Jordan* (1891), 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, on the ground that it is in conflict with the common law of England as recognized and adopted in the other states of the Union. The same case is again discussed in the dissenting opinion of Justices White and McKenna in the case of *Kean v. Calumet Canal Co.* (1902), 190 U. S. 452, 488, 23 Sup.

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Tolleston Club, etc. v. Carson—188 Ind. 642.

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Ct. 651, 47 L. Ed. 1134, where it is said that the Indiana court evidently adopted the rule announced in *Clute v. Fisher* (1887), 65 Mich. 48, 31 N. W. 614, which case followed two earlier decisions of the Supreme Court of Michigan. *Wilson v. Hoffman* (1884), 54 Mich. 246, 20 N. W. 37, and *Keyser v. Sutherland* (1886), 59 Mich. 455, 26 N. W. 865. It is then pointed out that the cases last cited were based on the authority of *Brown's Lessee v. Clements* (1845), 3 How. 650, 11 L. Ed. 767, which case had been expressly overruled by the Supreme Court of the United States long prior to the decision of *Clute v. Fisher, supra*. *Gazzum v. Phillips' Lessee* (1857), 20 How. 372, 15 L. Ed. 958.

The soundness of the rule adopted in *Stoner v. Rice, supra*, and followed in the later decisions of this state may be open to serious doubt. It is not neces-

3. sary for the court to express its approval or dissatisfaction with the rule adopted, or to intimate what the decision would be were the question a new one. The rule has stood and has been followed in this state for many years, and it has been recognized in the prevailing opinion in the case of *Kean v. Calumet Canal Co., supra*. No doubt many titles have passed on the faith of the rule, and the doctrine of *stare decisis* requires us to adhere to it now whether right or wrong. To change the rule now would unsettle titles and would result in greater harm than good. The court feels impelled to adhere to the rule adopted in *Stoner v. Rice, supra*, and followed by the later decisions for the reason that it has become a rule affecting the title to real estate in this state.

Appellants assert that this rule cannot be applied in construing the grant from the United States to the State of Indiana for the reason that the construction of a grant purporting to convey lands owned by the general government presents a federal question, and that the

extent of such grant and the question as to whether certain lands passed thereby, when presented either in a state or federal court, must be determined in accordance with the common law as announced by the Supreme Court of the United States, and cannot be decided in accordance with any local state law. As supporting this proposition the recent cases of *Chapman & Dewey v. St. Francis* (1913), 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564, and *Producers Oil Co. v. Hanzen* (1915), 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330, are cited, together with numerous other decisions to the same effect. As opposed to the proposition the cases of *Hardin v. Jordan*, *supra*; *Mitchell v. Smale* (1891), 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, and *Kean v. Calumet Canal Co.*, *supra*, are cited. In the case last cited a judgment of the Supreme Court of this state based on the rule announced in *Stoner v. Rice*, *supra*, was affirmed, and the prevailing opinion recognizes and applies that rule, because, as stated by the court, the local law of Indiana and the common law as understood by the court were the same so far as the case before the court was concerned, citing *Stoner v. Rice*, *supra*, and *Hardin v. Jordan*, *supra*. This court is not required, in the case before it, to decide the questions thus raised. In view of the conclusion reached it is not necessary to decide whether the question is one to be determined in accordance with the local law of the state or by an application of the rules of decisions announced by the Supreme Court of the United States. This case can be disposed of without deciding whether the land between the meander line shown on the plat of the government survey did or did not pass to the state under the swamp land grant. In the discussion following, the court assumes that the title to that land did pass to the state without so deciding.

The rule in *Stoner v. Rice*, *supra*, applies without

doubt to the construction of the grant made by the State of Indiana to the remote grantor of appellee;

4. but the rule with which we are dealing does not apply where it is apparent that the intention of the parties to the conveyance was to treat the meander line as a boundary limiting the extent of the grant. The application of this rule to the grants of lots 2 and 3 made by the State of Indiana to the remote grantor of appellee requires the court to hold that such grants included the submerged land south of the meander line within the side lines of those lots as extended to the south line of the subdivision, unless there is something in the form of the grants or in the statute under the authority of which they were made which indicates an intention to limit the grant to the number of acres north of the meander line and extending thereto as the boundary.

The lands in question were sold by the state under the authority of an act of the legislature, entitled, "An Act to regulate the sale of swamp lands donated by the United States to the State of Indiana, and to provide for the drainage and reclamation thereof in accord with the conditions of said grant." 1 R. S. 1852 p. 471.

In the recent decision of *State v. Tuesburg Land Co.* (1915), 61 Ind. App. 555, 109 N. E. 530, 111 N. E. 342, the Appellate Court of this state, in an able opin-

5. ion by Hottel, J., discussed the provisions of the act cited, and construed the grant in the light of the provisions of the statute under which it was made. The decision is based on the proposition that grants of public lands, being purely statutory, should be construed by the courts with reference to the statutes under which they are made, and that public officers in disposing of the lands of the state have no authority other than such as is conferred by positive statute. The conclusion



reached in that case was that the grants made by the state under the provisions of the act in question conveyed only the lands set off and bounded by the meander lines shown on the plat. The conclusion reached is supported by the authority of *State v. Portsmouth Savings Bank, supra*; *Tolleston Club v. Lindgren* (1906), 39 Ind. App. 448, 77 N. E. 818, and many other authorities cited in the opinion. After the decision by the Appellate Court, a petition to transfer the case to this court was filed under the provisions of the statute on that subject. After a careful consideration of the questions involved this court denied the petition to transfer, thus giving to the opinion the sanction of this court. Upon further consideration, this court is convinced that the question here involved is correctly decided by the Appellate Court in the case to which we have referred. The opinion is well considered and the reasons advanced support the conclusion reached. The court accordingly holds, following *State v. Tuesburg Land Co., supra*, that the grant from the state to the remote grantor of appellee included only the land set off by the meander line, and that such line constituted the southern boundary of the land granted. That being true, appellee derived no title to any land south of that line by the chain of conveyances under which she claims.

The court is not unmindful of the fact that a different rule was announced in the case of *Tolleston Club, etc. v. State, supra*, and in some later cases which

5. followed that decision. In these cases the rule announced in *Stoner v. Rice, supra*, was applied to grants made by the state under the provisions of the Swamp Land Act of 1852, but it does not appear that the provisions of that act were called to the attention of the court, or that they were considered in arriving at the result reached by any of such decisions. It is certain that the provisions of the statute are not re-

ferred to or discussed in any of the opinions to which we refer, and we are justified in the conclusion that those decisions were rendered without considering the statute or giving weight to its provisions. In other decisions where the statute was given consideration, a different rule was applied. *State v. Portsmouth Savings Bank, supra*; *Tolleston Club v. Lindgren, supra*; *State v. Tuesburg Land Co., supra*. In view of the conflict in this state, the court does not feel bound by the doctrine of *stare decisis* to adhere to any rule on this subject; but, on the contrary, feels free to adopt the rule which is supported by the better reason. In so far as the opinion in the cases of *Tolleston Club, etc. v. State, supra*, and the opinions in later cases based thereon, conflict with the rule herein stated, the same are hereby overruled.

The verdict of the jury finds in favor of appellee, Isabella Carson, as against the Tolleston Club as to all of the real estate described in her complaint, including that portion lying south of the meander line, and the judgment follows the verdict. From what has been said it appears that the verdict of the jury on the issue formed between those parties was contrary to law, and that the motion of the Tolleston Club for a new trial should have been sustained. The judgment as to the Tolleston Club is therefore reversed, with directions to sustain its motion for a new trial.

The questions presented by the assignments of error by appellant Walker depend for decision on the construction to be given to the quitclaim deed and the effect to be given to the tax deed, reference to which is made in a former part of this opinion.

The trial court construed the quitclaim deed as conveying to Walker an undivided interest amounting to five acres in the land described in the complaint, and held that the tax deed was insufficient to convey title,

and determined the amount due for which Walker was entitled to a lien, and directed the jury to return a verdict accordingly. The court was correct in its construction of the quitclaim deed and in its finding with reference to the effect of the tax deed; but the verdict returned in obedience to the court's instruction finds that Walker is the owner of an undivided interest amounting to five acres in the entire tract described in the complaint including the part lying south of the meander line; and it also found that he was entitled to a lien against the same land which he was entitled to have foreclosed. The verdict for the reasons heretofore stated is contrary to law, and the motion of appellant Walker for a new trial should have been sustained.

The judgment is therefore reversed as to appellant Walker, with instructions to grant a new trial.

NOTE.—Reported in 123 N. E. 169. See note 61 App. 608.

### CROUCH AND SON ET AL. v. PARKER.

[No. 23,604. Filed December 17, 1919.]

1. *APPEAL.—Overruling Demurrer.—Harmless Error.*—Where the court specially instructed the jury to consider only the third and fourth paragraphs of the defendant's answer, there was no available error in overruling the plaintiff's demurrer to the second paragraph of answer. p. 663.
2. *CONTRACTS.—Sale and Warranty.*—A contract for the sale of a chattel and a warranty thereof which are executed at the same time constitute one contract. pp. 663, 666.
3. *PRINCIPAL AND SURETY.—Liability of Surety.—Extent.*—Sureties not for hire are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions or equities are never allowed to enlarge or to change in any degree their legal obligations. pp. 666, 669.
4. *PRINCIPAL AND SURETY.—Change of Contract.—Release of Surety.*—Where notes were executed for the purchase price of a stallion which was warranted as a sure breeder, and the dates of maturity were so arranged that the breeding test

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Crouch & Son v. Parker—188 Ind. 660.

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could be completed before any note became due, an agreement by which an unpaid balance of one note was canceled and the plaintiff's payees were relieved from all liability on the warranty, without knowledge or consent of the surety, released the surety. p. 669.

5. *APPEAL.—Overruling Demurrer.—Harmless Error.*—Where no judgment was rendered against the plaintiffs on the defendant's cross-complaint, the overruling of a demurrer to a paragraph thereof presents no available error. p. 670.

From Johnson Circuit Court; *Hugh L. Wickens*, Special Judge.

Action by Jephtha Crouch and others against Hanna Parker and Robert H. Parker on a note. From a judgment against Robert H. Parker, and in favor of Hanna Parker, the plaintiffs appeal. (Transferred from the Appellate Court under §1399 Burns 1914, Acts 1901 p. 565). *Affirmed.*

*DeWitt C. Wilson* and *White & Owens*, for appellants.

*William Featherngill* and *Ivory J. Drybread*, for appellee.

**WILLOUGHBY, J.**—On December 29, 1908, Crouch and Son, appellants, sold and delivered to Robert H. Parker, also named as appellant, a certain stallion at the agreed price of \$1,950, for which sum the said Robert H. Parker and his mother, Hannah Parker, appellee, executed their three several promissory notes each calling for \$650 and interest. As a part of the contract of sale, and contemporaneously with the execution and delivery of said notes, the said Crouch and Son, hereinafter designated as appellants, executed and delivered to said Robert H. Parker their written contract, by which they warranted said stallion to be a "satisfactory sure breeder," and agreed that if said horse should not be as warranted, they would, on or before April 1, 1910, take him back, if delivered to them at Lafayette, Indiana, and give in exchange another stallion of equal value and of the same breed.

The horse did not prove to be as warranted, and appellants were so notified prior to April 1, 1910, whereupon appellants, without the knowledge or consent of appellee, extended said warranty for a period of one year, at the expiration of which time, and on April 13, 1911, appellants entered into a new agreement with Robert H. Parker, by the terms of which appellants surrendered to said Parker the note due April 1, 1910, on which there was a balance due in the sum of \$324.34, and said Robert H. Parker released said appellants from all liability on said warranty. Thereafter the last of the three \$650 notes became due, was unpaid, and this action was begun by appellants against Robert H. Parker and appellee to collect said note. Appellee filed four affirmative paragraphs of answer designated as the second, third, fourth and fifth paragraphs, also, a cross-complaint against appellants. Separate demurrers for want of facts were filed to these answers and to the cross-complaint, which demurrers were overruled, except the demurrer to the fifth paragraph of answer, which was sustained. Appellants' reply in denial to the several paragraphs of answer, and their answer in denial to the cross-complaint, closed the issues, and the cause was submitted to a jury, resulting in a verdict and judgment against Robert H. Parker for the full amount of the note, and a verdict in favor of appellee. Appellants' motion for a new trial was overruled. The errors relied on for reversal are: (1) The rulings of the court on the demurrers to the three affirmative paragraphs of answer and the ruling of the court on the demurrer to the third paragraph of the cross-complaint of appellee; and (2) the overruling of the motion for a new trial.

The court having specially instructed the jury that in their deliberations they should consider only the third

and fourth paragraphs of appellee's answer,  
1. there is no available error in the action of the court in overruling appellants' demurrer to the second paragraph of answer. *Life Assurance Co. v. Haughton* (1903), 31 Ind. App. 626, 628, 67 N. E. 950.

The third and fourth paragraphs of answer each aver that the note sued on and the warranty given by appellants were contemporaneously executed and delivered; that the execution and delivery of the warranty was a consideration for appellee's execution of the note as surety; that the stallion was not as warranted, and that the extension of the warranty was without her knowledge and consent, as was the new agreement of April 13, 1911. The only objection to these paragraphs of answer which appellants specified in their memorandum to the demurrers thereto is that appellee "had not executed the warranty, was not a party to it, and therefore has no right to base a defense thereon." The question thus presented for our consideration is whether or not the changes in the original contract, which changes were made by agreement between the principal on the note and the appellants, without the knowledge of appellee, discharged appellee as surety. Appellants concede that if appellee had been a party named in the warranty, the extension and surrender of that instrument without her consent would have released her from liability on the note; but they contend that, inasmuch as her name does not appear in the warranty, she is not released.

A contract of sale and the warranty of the chattel sold, executed at the same time, constitute one contract.

*LaGrange v. Coyle* (1911), 50 Ind. App. 140, 98

2. N. E. 75; *McCarty v. Williams* (1914), 58 Ind. App. 440, 108 N. E. 370; *Shordan v. Kyler*

(1882), 87 Ind. 38, 41.

In *Allen v. Nofsinger* (1859), 13 Ind. 494, it is held that a promissory note, and the contract in writing out of which it arises, if both are executed at the same time, constitute but one agreement. In *Cunningham v. Gwinn* (1837), 4 Blackf. 341, it is held that, if a title bond be executed in such case bearing the same date with the note, they constitute one contract, and the note is subject to the same defense as if it showed, on its face, the consideration for which it was given. In *Wood v. Ridgeville College* (1888), 114 Ind. 320, 16 N. E. 619, it is held that when, at the time a promissory note was executed to a college for a scholarship therein, a certificate of scholarship was issued to the maker, to which was appended an agreement that the note was to be returned if \$10,000 worth of scholarships were not sold within a given time, the note and the agreement constitute one contract. In *Woodward v. Mathews* (1860), 15 Ind. 339, it is held that a written contemporaneous agreement, showing the consideration and conditions upon which a promissory note was given, may, in a suit upon the note, be given in evidence as part of the same contract. In *McDonald v. Huestis* (1890), 1 Ind. App. 275, 27 N. E. 509, it is held that an agreement in writing, executed at the same time a promissory note is executed, with reference thereto, becomes a part of the contract, and it and the note must be construed together in ascertaining the liability of the maker of such note and his surety. In *Rosenthal v. Rambo* (1905), 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678, the court, in construing a contract similar to the one at bar, said that the promise to pay the notes was based on the corresponding promise of Crouch and Son to make good the horse as a satisfactory breeder, and the duty to pay, in whole or in part, remained inchoate during the breeding test, and until performance or default by the sellers. So blended were the transactions that no assignment

of the notes, which carried upon their face notice of probable or possible defenses, could separate these equities from the terms of the contract. The case of *Hickman v. Rayl* (1877), 55 Ind. 551, was an action founded on a promissory note, and an answer to the complaint alleges that the note was executed by the defendant Silas Hickman, as principal, and by the defendant George W. Hickman, as surety for the said Silas, in consideration of the rent of a farm owned by the plaintiff, which he rented to the defendant Silas Hickman by articles of agreement made between the said plaintiff and said Silas, on the same day the note was executed, and as a part of the same agreement, by which articles the plaintiff, in consideration of the obligation of the defendant Silas, thereafter named, agreed to rent to the said Silas the farm then owned by the plaintiff; that the note was given for the rent of the place. It is further alleged in the answer that plaintiff never delivered the premises to the said Silas Hickman as provided for in the contract. The court in that case said that the making of the note sued on and the execution of the agreement set up in the answer were simultaneous acts, done by the same parties, about the same subject-matter; the note and the agreement, therefore, belong to the same transaction, and, taken together, constitute but one contract, as much as if they were written on the same piece of paper. In the case of *Zimmerman v. Judah* (1859), 13 Ind. 286, which was a suit by the appellee against the appellant on a promissory note, it appears by the answer of defendant, appellant, that at the same time that the note sued on was executed, Judah and Brown entered into a contract, by which Brown was to erect for Judah a certain building, to be wholly completed ready for occupancy by November 1, 1856. The agreement fixes the amount to be paid, the time of payment, etc. The last clause of the agreement is as follows:



"5th. As to the balance, 2,000 dollars, it is agreed as follows: Said *Judah* herewith advances to said *Brown*, as and for a loan on a note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract is provided; and which note, also, shall not become or be payable so long as said *Brown* shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided."

Dated October 13, 1855, which is the same date as the note, and signed by Brown, Zimmerman and Judah. The answer further shows that on June 5, 1856, the following further agreement was made without the knowledge or consent of Zimmerman, by which said Brown and one Stokes should, by November 1, 1856, put an additional story on the building then under contract between Brown and Judah, for the further consideration of \$1,700, to be paid on the completion thereof. It was held that the second contract was such an alteration of the original agreement that it discharged Zimmerman, the surety. *Miller v. Stewart* (1824), 22 U. S. (9 Wheat.) 680, 6 L. Ed. 189, holds that the contract of the surety is to be strictly construed, and is not to be extended beyond the scope of its terms.

Under the facts shown by the undisputed evidence in the instant case, the note sued upon and the written guarantee of appellant constitute the sale contract of the horse, and are as much one contract as if all of the writings had been embodied in one instrument.

In *Judah v. Zimmerman* (1864), 22 Ind. 388, it is held that any material alteration of a contract, without the consent of the surety, will discharge him.

3. The liability of a surety cannot be extended be-

yond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. Chitty, Contracts 529; *Miller v. Stewart*, *supra*. In *Campbell v. Gates* (1861), 17 Ind. 126, the court says that, ordinarily, a surety is liable to the creditor in the same manner, and to the same extent, as the principal debtor, but as an exception to this rule the surety is allowed to set up in defense any matter which ought, in equity, to go to his personal exoneration. If the contract of suretyship is, as between the creditor and the surety, subject to a condition, the surety is discharged if the condition be not performed. Burge, Suretyship 115, 116. Indeed, we perceive no valid reason why the engagement of the surety, who, as such, executes a written contract, may not be founded upon a consideration variant from that which induces its execution by his principal. And if, as in the case at bar, such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would evidently operate as a fraud upon the surety, and, upon that ground, release him from all liability upon his engagement. 2 Am. Lead. Cases 262; *Pidcock v. Bishop* (1825), 3 B. & C. 605. And it is plainly competent for the surety to set up and prove such failure of consideration, because it has been often adjudged that such defense is not in conflict with the legal effect of the contract. It is a sound and well-settled principle of law that sureties are not to be made liable beyond their contract, and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge

him from responsibility. *Sprigg v. Bank of Mount Pleasant* (1840), 39 U. S. (14 Pet.) 201, 10 L. Ed. 419. In *Bailey v. Boyd* (1881), 75 Ind. 125, it is held that if a creditor holding a composition bond, by an agreement with the debtor, for a valuable consideration, without the knowledge or consent of the surety, materially changes the terms of the contract of indebtedness, he thereby releases the surety. In the *Weir Plow Co. v. Walmsley* (1887), 110 Ind. 242, 11 N. E. 232, the court holds that a surety is not bound beyond the terms of his contract, reasonably interpreted. In that case, on page 246, the court said: "‘Nothing,’ says Judge Story, ‘can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient, that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.’ *Miller v. Stewart*, 9 Wheaton 680. Such has always been the doctrine of this court. *Judah v. Zimmerman*, 22 Ind. 388; *Markland, etc., Co. v. Kimmel*, 87 Ind. 560; *City of Lafayette v. James*, 92 Ind. 240, (47 Am. R. 140); *Weed S. M. Co. v. Winchel*, 107 Ind. 260." A surety is "a favored debtor." The slightest fraud on the part of the creditor touching the contract annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability. *Magee v. Manhattan Life Ins. Co.* (1875), 92 U. S. 93, 23 L. Ed. 699.

In *Jeffries v. Lamb* (1880), 73 Ind. 202, the court holds that, where the payee of a note induces another to become surety thereon, by agreeing that he would

deliver to the maker a previous note and chattel mortgage for cancellation, so that such surety might indemnify himself by obtaining a first mortgage on the property mortgaged, a failure and refusal to comply with such agreement constitute a failure of consideration as between such payee and surety.

In *Trentman v. Fletcher* (1885), 100 Ind. 105, 109, the court said that, where a surety signs a note in consideration of an agreement with the payee that the latter should do something in the future, if the agreement is sufficiently certain and of such a character that the surety has a right to rely on its performance, and such agreement is not a contradiction of the note, or some of its terms, we perceive no reason why a failure on the part of the payee to perform should not be held a failure of the consideration as between the payee and surety.

In judging of the character or sufficiency of the defense of the appellee, there should be taken as a guide the rule, which is perhaps without an exception,

3. that sureties not for hire are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. This rule is thus forcibly put by Chancellor Kent in the 3rd Commentaries, p. 124, where he said: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled, that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication." *Leggett v. Humphreys* (1858), 62 U. S. (21 How.) 66.

The case at bar was a suit by the payees of the note against the makers. No equities of third parties have intervened. The contract of the appellee was

4. one of surety for the purchase price of the horse.

She was induced to enter into the contract of suretyship by the warranty of the appellants, which was read to her by appellants' agent before she signed the note sued on. The maturities of the notes were so arranged that the breeding test could be completed before any note became due. At or about the time the first note became due, the original contract was, without the knowledge or consent of appellee, changed in this: that on April 1, 1910, the warranty was extended for one year, and that on April 13, 1911, the note due April 10, 1910, on which there was at that time an unpaid balance of \$324.34, was canceled by appellants Crouch and Crouch, and appellants were released from all liability on the warranty. Any agreement or dealing between the creditor and principal which materially varies the terms of the contract by which the surety is to be bound, without the consent of the surety, will release the surety from his obligation. *Bailey v. Boyd* (1881), 75 Ind. 125; *Weed Sewing Machine Co. v. Winchel* (1886), 107 Ind. 260, 7 N. E. 881; *Post, Admr., v. Losey* (1887), 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Weir Plow Co. v. Walmsley* (1887), 110 Ind. 242, 11 N. E. 232; *County of Glenn v. Jones* (1905), 146 Cal. 518, 80 Pac. 695, 2 Ann. Cas. 764.

The court did not err in overruling the demurrers to the third and fourth paragraphs of answer.

No judgment was rendered against appellants on the cross-complaint of appellee. Therefore, the overruling of the demurrer to the third paragraph thereof

5. presents no available error. *Winnemucca Water, etc., Co. v. Model Gas Engine Works* (1913), 179 Ind. 542, 544, 101 N. E. 1007; *Royse v. Turnbaugh* (1889), 117 Ind. 539, 20 N. E. 485.

The appellants claim that instruction No. 2 required the plaintiff to prove the execution of the note in suit; that instruction No. 3 does not correctly state the ma-

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Sell, Trustee, v. State, ex rel.—188 Ind. 671.

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terial averments of each of the third and fourth paragraphs of answer; and that instruction No. 3 embodies a wrong conception of the law.

These instructions are not subject to the infirmities claimed by appellants. The instructions, taken as a whole, state the law of the case correctly, and the verdict is sustained by sufficient evidence. No error appearing in the record, the judgment is affirmed.

NOTE.—Reported in 125 N. E. 453.

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SELL, TRUSTEE, ET AL. v. STATE, EX REL. ROTH.

[No. 23,341. Filed December 18, 1919.]

1. DEDICATION.—*Deed to Township Trustee for Cemetery.*—A deed of land to a township trustee and his successors in office, to be used by the general public for a burying ground, and to be under the direction, care and superintendence of the trustees of the township, was sufficient to convey the land to the township, the establishment of suitable burial places being encouraged by public policy. p. 673.
2. DEDICATION.—*Deed for Cemetery.—Acceptance by Trustee.—Effect.*—A township trustee's acceptance of a deed of land to him as trustee for cemetery purposes must be deemed to pass title to the township and to bind the grantors to a dedication. p. 673.
3. DEDICATION.—*Cemeteries.—User by Public.—Acceptance.*—Where land was deeded to a township trustee for use as a cemetery, the use thereof by the general public, and the care bestowed thereon by the successive trustees, made the dedication of the land as a cemetery irrevocable. p. 673.
4. CEMETERIES.—*Public.—Care and Maintenance by Township.*—Where land was deeded to a township for a public cemetery, and the deed was duly accepted, and the township has sufficient funds to pay for its maintenance without violating any limitation upon its power to incur debt, the advisory board may be compelled, under §§4438, 4438a Burns 1914, Acts 1913 p. 290, to appropriate, and the trustee to expend, funds for the maintenance thereof, under a showing that the trustee, having no appropriation for the purpose, refuses to ask the advisory board therefor, and the advisory board refuses to make any appropriation for the purpose. p. 674.

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Sell, Trustee, v. State, ex rel.—188 Ind. 671.

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From Huntington Circuit Court; *Eben Lesh*, Special Judge.

Action for writ of mandate by the State of Indiana, on the relation of Charles Roth, against John Sell, township trustee, and others. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

*George M. Eberhart* and *Sumner Kenner*, for appellants.

*Moffett & Roselip*, for appellee.

HARVEY, J.—This is an action by appellee for writ of mandate to compel the advisory board of Warren township, Huntington county, Indiana, to make appropriation of sufficient of the township's funds to properly care for a cemetery in said township, and to compel the township trustee to use such appropriation for that purpose.

The theory of the complaint is that §§4438 and 4438a Burns 1914, Acts 1913 p. 290, impose upon the advisory board of the township, and upon the trustee, the duty of so caring for the described cemetery. Said sections are as follows:

"4438. Abandoned Cemeteries, Care of.—1. That any cemetery located in any township, or within any city or town within such township, which cemetery is abandoned, or has been or shall be hereafter deeded to such townships, and not under the control or management of any organization or association or individual whose duty it is to care for and maintain such cemetery, shall be under the care and supervision of the township trustee of such township."

"4438a. Care and Maintenance of Cemeteries.—2. It shall be the duty of the township trustee to care for and maintain in a respectable condition, by fencing, when there is no fence, by keeping the weeds,

briars and brush mowed and cleaned up in all public cemeteries located within his township, or within any city or town located within such township, which are wholly or in part abandoned or unused and are not under the supervision of any association, organization or individual whose duty it is to care for the premises."

The questions here raised are upon the ruling of the court holding the complaint sufficient, and upon exceptions to the conclusions of law upon facts specifically found.

Though it is true the amended complaint does not allege in direct terms that the cemetery involved was deeded to the township, the complaint does allege

1. that the ground was deeded "to Thomas Bolinger, trustee of Warren township, and to his successors in office for the uses" in the deed stated, as fol-

2. lows: "to be used by the general public for a burying ground. To be under the direction, care and superintendence of the trustees of said township."

In view of well-established public policy, supported by decisions of nearly every state in the Union, to the effect that the establishment of suitable places for the burial of the dead shall be encouraged, we do not hesitate to hold that this deed should be construed as conveying said land to the township. It is alleged that said township trustee accepted the same. For such uses and purposes, his acceptance must be deemed to pass the title and bind the grantors to a dedication.

It is alleged that the general public has made contemplated use of the dedicated ground, and, if anything further than the acceptance of the trustee were

3. necessary, this use by the general public and the care bestowed by successive trustees made the dedication irrevocable.



The general assembly by the act above quoted imposed an obligation upon the township to be carried into effect by its trustee, and it must follow that the advisory

4. board must furnish funds for the expense thereof. This opinion is not to be construed as holding that a township trustee can bind the township to carry out a stipulation in a deed that such a cemetery shall be cared for at the expense of the township. It is only intended to hold that said statute imposes such obligation on the township when the deed has been, as we here hold, made to the township. The cemetery is alleged to be not under the control or management of any organization, association, or individual charged with the duty of caring for the same. As we are of opinion that the cemetery was deeded to the township, we need not consider or decide whether the same is an abandoned cemetery within the purview of the statute. The complaint alleges that the township has funds amply sufficient to pay such expenses without violating any limitation upon its power to incur debt; that the trustee has *no* fund appropriated for such purpose, and refuses to ask the advisory board therefor; that the advisory board has refused to make *any* appropriation for such purpose.

The demurrer to the complaint was properly overruled.

The facts specially found fully support the complaint, hence the exceptions to the conclusions based thereon were properly overruled.

The judgment of the trial court is affirmed.

NOTE.—Reported in 125 N. E. 402.

## KILGORE ET AL. v. TEMPLER ET AL.

[No. 23,541. Filed December 18, 1919.]

1. HUSBAND AND WIFE.—*Insanity.—Effect on Lands Held as Tenants by Entireties.*—Section 4005 Burns 1914, Acts 1899 p. 109, providing that, where a husband and wife own land as tenants by the entireties or as joint tenants, and one of them is adjudged insane, they become tenants in common, does not *ipso facto* create a tenancy in common on such adjudication of insanity, since such section, when construed with §4005, contemplates that after the adjudication of insanity an action shall be brought by one of the parties authorized by the statute, in which there shall be pleaded and proved the names of the tenants, the nature of the tenancy, the description of the realty affected, that one of such tenants has been adjudged insane by a court of competent jurisdiction and that the insanity is probably permanent, after which it is the duty of the court to enter a decree changing the tenancy to a tenancy in common. p. 679.
2. INSANE PERSONS.—*Scope of Proceedings.—Statute.*—A proceeding under §3101 *et seq.* Burns 1914, Acts 1895 p. 205, is limited to the investigation of the mental status of the person alleged to be of unsound mind and to the making of such orders as are authorized in such statute; hence, where a person adjudged to be insane is married and the owner of land under a joint tenancy or a tenancy by the entireties, the judgment rendered could not have the effect of changing the tenancy to a tenancy in common by virtue of §§4004, 4005 Burns 1914, Acts 1899 p. 109, even though the findings show that the insanity is probably permanent; and this would be true regardless of the party instituting the insanity proceeding. p. 680.
3. HUSBAND AND WIFE.—*Insanity.—Change of Tenancy.—Statute.*—The right of action, under §§4004, 4005 Burns 1914, Acts 1899 p. 109, to convert an estate by entireties held by a husband and wife into a tenancy in common when one of such tenants has been adjudged insane, does not survive the death of the insane tenant, since the entire estate on the latter's death vests immediately in the survivor. p. 681.
4. COURTS.—*Jurisdiction.—Constitutional Questions.*—The Supreme Court has jurisdiction of an appeal challenging the validity of a statute as being in conflict with the federal and state Constitutions. p. 682.

From Delaware Circuit Court; *Theodore Shockney*,  
Special Judge.

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Kilgore v. Templer—188 Ind. 675.

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Action by Edward R. Templer and others against Charles W. Kilgore and others. From a judgment for the plaintiffs, the defendants appeal. *Reversed.*

*Silverburg, Bracken & Gray*, for appellants.

*George H. Koons, Sr., George H. Koons, Jr., and Edward R. Templer*, for appellees.

LAIRY, J.—Appellees brought a suit against appellants in the trial court to obtain partition of certain real estate described in the complaint and to have it declared indivisible and sold, and to have the proceeds distributed in accordance with the interests of the several tenants in common. The real estate described consisted of a residence of considerable value located in the city of Muncie, Indiana, the title to which was acquired in the year 1888 by James N. Templer and Susan Templer, his wife, as tenants by the entireties. The record shows that James N. Templer and Susan, his wife, continued to live together as husband and wife until the death of James N. Templer, which occurred on February 3, 1909, and that thereafter Susan Templer, his widow, continued to occupy said premises until her death, which occurred on November 5, 1917. James N. Templer and his wife, Susan, had no children born to them as the fruits of their marriage, but they each had children as the fruits of former marriages.

The plaintiffs in the trial court were the heirs of James N. Templer, and the defendants, who are appellants in this court, claim as the heirs and devisees of Susan Templer. The record further shows that on December 19, 1908, James N. Templer was adjudged by the Delaware Circuit Court to be a person of unsound mind and incapable of managing his own estate, and that such condition of mind was probably permanent. This adjudication was made on a petition filed by John P. Shoemaker, a brother of Susan Templer, which al-

leged that James N. Templer was a person of unsound mind and incapable of managing his estate, and that said condition of mind was probably permanent. The court also found that a guardian should be appointed and, by its order, appointed the People's Trust Company of Muncie as such guardian. Appellants claim title to the whole of the real estate described to the exclusion of appellees on the ground that Susan Templer on the death of her husband became the sole tenant of the estate previously held by her and her husband as tenants by entireties.

The case was tried by the court on a complaint consisting of four paragraphs. The first two paragraphs of the complaint proceed on the theory that the tenancy by entireties existing in James N. Templer and Susan, his wife, was during the lifetime of both of such tenants converted into a tenancy in common, under and pursuant to §§4004, 4005 Burns 1914, Acts 1899 p. 109, and that James N. Templer at the time of his death was the owner as a tenant in common with his wife, Susan, of one-half the real estate described, and that the one-half of which he was so seized descended to plaintiffs as his heirs. The other two paragraphs of the complaint proceed on the theory that §4004, *supra*, creates a cause of action which, under the provisions of §4005, *supra*, enables the sane tenant of an estate by entireties, or the guardian of the insane tenant of such an estate, to maintain an action against the cotenant, and, on proof of the essential facts as stated in the act, to obtain an order of court changing and converting the tenancy by the entireties into a tenancy in common, and that on the death of either of the tenants by entireties the right of action created by the statute survives in the heirs of such deceased tenant, and can be maintained by them against the surviving tenant, or against the heirs of such tenant to whom the real estate has descended.

The court made a special finding of facts and pronounced conclusions of law thereon in favor of appellees on both of the theories hereinbefore stated and entered judgment in their favor in conformity to the findings and conclusions of law. Many alleged errors are assigned as cause for reversal, but the court will discuss only those based on the error of the court in stating its conclusions of law.

By its second conclusion of law, the trial court in effect held that the proceeding of the Delaware Circuit Court on the petition of John P. Shoemaker against James N. Templer and the judgment based thereon, by which it was adjudicated that James N. Templer was a person of unsound mind and incapable of managing his estate and that his insanity was probably permanent, had the force and effect of terminating the estate by entireties which had previously existed between James N. Templer and his wife, Susan, in the real estate in controversy as of the date of the entry of such judgment, and that the nature of their tenancy in said real estate was then and thereby changed and converted into a tenancy in common by force of §§4004, 4005 Burns 1914, *supra*.

Section 4004, *supra*, provides: "That whenever a husband and wife shall own and hold any real estate as joint tenants or tenants by entireties, and one of them shall have been adjudged a person of unsound mind by a court of competent jurisdiction, and when said insanity is probably permanent, they shall cease to hold and own said real estate as joint tenants or tenants by entireties, as the case may be, but the title to said real estate shall be owned and held by them as tenants in common."

Section 4005, *supra*, provides that: "Said joint tenancy or tenancy by entireties shall not be converted into

an estate in common, except by a finding and judgment of the circuit or superior court that one of said parties has been adjudged a person of unsound mind and that said insanity is probably permanent, when said court shall enter a decree that said estate shall be and become an estate in common, which said action may be prosecuted by the guardian of said person of unsound mind or by the husband or wife, as the case may be, who is of sound mind."

If the first section of the act stood alone, there might be some doubt as to its force and effect, but when it is read in connection with §4005, *supra*, it becomes

1. clear that the legislature did not contemplate that an adjudication that one of the tenants was a person of unsound mind should operate *ipso facto* to convert the tenancy previously existing into a tenancy in common. In fact, the latter section clearly negatives such an intention. That section contemplates that after one of the tenants has been adjudicated to be a person of unsound mind an action shall be brought in the circuit or superior court by one of the parties upon whom the statute confers the right to bring such action. The petition or complaint should show the description of the real estate, the title to which is to be affected, the nature of the tenancy by which it is held, and the names of the tenants, that one of the tenants has been adjudged a person of unsound mind by a court of competent jurisdiction, and that such insanity is probably permanent. On proof of such facts the statute provides that the court shall enter a decree that said estate shall be and become an estate in common. Section 4004, *supra*, creates a cause of action and specifies the facts essential to constitute the cause of action so created. Section 4005, *supra*, specifies who may maintain the action and the court in which it shall be brought, and provides

what facts shall be proved in order to justify the court in entering its decree. It will be noted that the facts, of which proof is required under this section, are identical with those prescribed by the preceding section as being essential to the cause of action which it creates. On proof of such facts in the proceeding thus authorized, the statute provides that the court shall enter a decree that the estate by entireties shall be and become an estate in common. By the terms of the statute the estate by entireties terminates and the estate in common begins at the time of the making of such decree and by virtue of its force and effect. As opposed to this construction appellees rely on the latter part of §4004, *supra*. The language so relied on, when considered in connection with the provisions of the following section, must be construed to mean that the husband and wife shall cease to own and hold said real estate as tenants by entireties, but said real estate shall be owned and held by them as tenants in common from and after the entry of a decree to that effect in an action brought under the provisions of §4005, *supra*.

Appellants seem to attach some importance to the fact that the petition to have James N. Templer declared a person of unsound mind was filed by the brother

2. of Susan Templer, the cotenant of James N.

Templer, at her instance and request, and that such petition alleged, and the court found and adjudicated, that the insanity of James N. Templer was probably permanent. In view of the construction placed on the statute, it is a necessary prerequisite to the right to maintain the proceeding provided for therein that one of the tenants of the estate to be affected by the proceeding had been adjudicated by a court of competent jurisdiction to be a person of unsound mind. This adjudication is authorized by a statute which provides a special form of procedure to be followed in such cases.

§3101 *et seq.* Burns 1914, Acts 1895 p. 205. The only matter to be investigated in such a proceeding is the mental status of the person who is alleged in the affidavit to be a person of unsound mind. If the court finds such person to be unsound of mind and incapable of managing his own estate, it may so find and enter its judgment accordingly; and in that event it may also make an order appointing a guardian for such person and fixing the bond to be given by such guardian. In a proceeding under this statute, the court is confined to the determination of such issues and to the making of such orders as are authorized by the statute. That being true, it could make no difference, so far as concerns the subsequent proceedings authorized by the statute cited, who might institute the proceedings under which the adjudication of unsoundness of mind was made. In the proceeding to have James N. Templer adjudged a person of unsound mind the finding and judgment of the court that his insanity was probably permanent was unnecessary and wholly immaterial, and therefore such finding and judgment could not and did not in any way affect the nature of the estate in the lands held by him and his wife as tenants by entireties. This would be true even though his wife, Susan, had filed the affidavit on which such proceedings were based, thus making herself a party to that proceeding, and *a fortiori* the effect of such a finding and judgment in a proceeding of this kind which she directed and controlled could not affect the nature of an estate in lands held by her and her husband as tenants by entireties.

It remains to be decided whether the right of action created by §§4004, 4005, *supra*, in favor of the sane tenant or the guardian of the tenant who is insane

3. does or does not survive to the heirs of one of the tenants by entireties who dies during the exist-



ence of such tenancy. In view of the nature and incidents of the estate by entireties, the mere statement of the proposition practically amounts to an answer to the question involved. On the vesting of an estate by entireties each of the tenants becomes seized of the entire estate, but neither is seized of any divisible part thereof; and therefore, when one of the tenants dies, the survivor, being already seized of the whole, can acquire no new or additional interest by virtue of his survivorship. He holds the entire estate, not by virtue of any right which he acquires as survivor, but by virtue of the original grant. *Sharpe v. Baker* (1911), 51 Ind. App. 547, 96 N. E. 627, 99 N. E. 44.

Under the law the death of one of the tenants by entireties terminates the estate. When that event occurs the survivor holds the entire estate by virtue of the original grant. The title then held is the same in all respects as though he had been the sole tenant from the time of the grant. It thus appears that the right of action created by the sections of statute cited cannot survive to the heirs of one of the deceased tenants, for the reason that in every instance the tenancy by entireties would cease to exist at the very instant that the right of action would be acquired by the heirs of the deceased tenant. From that time on the surviving tenant would hold the entire estate, and no estate by entireties would be in existence upon which the decree of a court could operate.

This court has jurisdiction of the appeal in this case because the validity of the sections of statute quoted is challenged as being in violation of certain provisions of the federal Constitution and the Constitution of this state.

4. In view of the construction placed by this court on the sections of statute cited, it is not required to decide the constitutional question presented.

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Staub v. State—188 Ind. 683.

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Judgment reversed, with instructions to the trial court to restate its conclusions of law in conformity with this opinion.

NOTE.—Reported in 125 N. E. 457.

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STAUB v. STATE OF INDIANA.

[No. 23,576. Filed December 18, 1919.]

CRIMINAL LAW.—*Affidavit Showing Conviction in City Court.—Submission to Jury.—Reversible Error.*—On the trial in the criminal court on appeal from a conviction in the city court, it was error to submit to the jury, over the defendant's objection, the affidavit upon which the prosecution was based, which was taken to the jury room, where such affidavit contained an indorsement showing the conviction and the fine imposed in the city court.

From Marion Criminal Court (49,303); *James A. Collins*, Judge.

Prosecution by the State of Indiana against Dolph Staub. From a judgment of conviction, the defendant appeals. *Reversed.*

*Alvah J. Rucker*, for appellant.

*Ele Stansbury*, Attorney-General, and *Dale F. Stansbury*, for the state.

WILLOUGHBY, J.—Appellant was convicted in the city court of the city of Indianapolis for violation of the Prohibition Law. He appealed to the criminal court of Marion county, Indiana; was tried by jury, and again convicted. From the judgment of the criminal court he appeals and alleges that the court erred in overruling his motion to erase and expunge certain prejudicial matter written and printed on the back of the affidavit upon which this prosecution is based, said prejudicial matter being a memorandum showing the conviction and punishment of the appellant in the city court, and in overruling appellant's motion for a new trial. One of the

reasons assigned in the motion for a new trial is that the court erred in permitting to go to the jury, to be used by them in arriving at their verdict, the affidavit upon the back and reverse side of which was written and printed what purported to be and was the sentence and fine, to wit, \$100, and the number of days in jail, to wit, 120, which appellant received in the city court of the city of Indianapolis, from which sentence, fine, and imprisonment this proceeding is an appeal.

The appellee claims that the record does not show that the affidavit with the record of conviction thereon was ever received by the jury. It appears from the record that the appellant moved the court to erase and expunge the written and printed matter on the back of the affidavit showing the conviction and punishment of appellant in the city court. This motion was overruled, and to such ruling the appellant excepted.

The instructions were brought into the record by a bill of exceptions, and from such bill it appears that appellant objected and excepted to the giving of instruction No. 13, for the reason that it permitted the jury to take with them, when they retired to consider their verdict, the affidavit which had the finding and judgment of the city court indorsed thereon. Instruction No. 13 reads as follows: "You will be permitted to take the affidavit with you in your deliberations but you are instructed that such affidavit is submitted to you only for the purpose of informing you of the nature of the charge. It is not to be considered by you as evidence of any fact in issue."

We think this record shows that the jury took the affidavit with the prejudicial matter on the back of it with them to the jury room. The submission, over appellant's objection, of the affidavit with the memorandum indorsed on the back thereof, showing the conviction and punishment of appellant in the city court,

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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was error requiring a reversal of the judgment. *Lotz v. Briggs* (1875), 50 Ind. 346, 348; *Torphy v. State* (1917), 187 Ind. 73, 118 N. E. 355; *State v. Tucker* (1902), 75 Conn. 201, 203, 52 Atl. 741; *Ogden v. United States* (1902), 112 Fed. 523, 526, 50 C. C. A. 380; *McNulty v. State* (1919), 189 Ind. —, 125 N. E. 41.

Judgment reversed, with instructions to the Marion Criminal Court to sustain appellant's motion for a new trial.

NOTE.—Reported in 125 N. E. 399.

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## STATE, EX REL. GERMAN INVESTMENT AND SECURITIES COMPANY v. CITY OF INDIANAPOLIS.

[No. 23,354. Filed May 27, 1919. Rehearing denied December 19, 1919.]

1. MANDAMUS.—*Remedy*.—*Scope*.—Mandamus will be issued only in cases where the facts show a clear legal right on the relator's part to the relief sought and a clear legal duty resting on the defendants to perform the thing demanded. p. 691.
2. MUNICIPAL CORPORATIONS.—*Street Improvements*.—*Contractor*.—*Assignment of Assessments*.—*Rights of Assignee*.—The assignment by the contractor of assessments to be made on the completion of a street improvement, and its acceptance by the city, conferred on the assignee an equitable interest therein, but the interest acquired thereunder was no different than that of the contractor, in the absence of the assignment, and was therefore subject to any defenses which might exist against the contractor. p. 691.
3. MUNICIPAL CORPORATIONS.—*Street Improvements*.—*Final Assessments*.—In view of §8711 Burns 1914, Acts 1909 p. 412, neither the contractor nor the assignee of assessments for street improvements can require the board of public works of the city to make final assessments to pay for the work, unless such work has been finally accepted as completed in accordance with the contract. p. 692.
4. MUNICIPAL CORPORATIONS.—*Street Improvements*.—*Acceptance*.—*Rescission of Order*.—Though the board of public works, by approval of the report of the city engineer, entered an order accepting street improvements as completed according to the

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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contract, the board had the right to rescind the order on the discovery that the work had not been properly constructed and was of no benefit to property affected, and it was the duty of the board to exercise that power, unless the rights of innocent parties had intervened so as to make such course inequitable. pp. 692, 695.

5. MUNICIPAL CORPORATIONS.—*Street Improvements.—Inspection.—Waiver of Defects.*—Though the work and operations of the contractor for street improvements, and the kind and character of the material used, were supervised as the work progressed by the engineering department of the city, such facts cannot be held as a waiver by the city of its right to reject the work for failure to construct it as required by the contract, the rights and duties of the city being purely statutory. pp. 693, 695.
6. MUNICIPAL CORPORATIONS.—*Street Improvements.—Authority to Make Assessments.*—A municipality has no power to make assessments for street improvements without statutory authority. pp. 693, 694.
7. MUNICIPAL CORPORATIONS.—*Street Improvements.—Acts of Officers.—Payment of Contract Price.—City's Liability.*—In awarding contracts and performing other duties imposed by the statute authorizing such proceedings, the municipal officers do not act in behalf of the municipality in such a way as to create any liability against it under the contract, since the contract price can be paid only from special assessments made under statutory authority, and the contractor is bound by the statutory provisions which authorize and govern the contract and provide for its acceptance. p. 694.
8. MUNICIPAL CORPORATIONS.—*Street Improvements.—Compliance with Contract.—Acceptance.*—The decision of the board of public works as to whether street improvements have been made in substantial compliance with the statute is quasi-judicial in its nature and when made is conclusive, in the absence of fraud, on all persons affected thereby, and may be set aside only in a direct proceeding for that purpose on the ground of fraud. p. 694.
9. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assignment of Assessments.—Assignee's Rights.*—Where a contractor for street improvements assigned assessments before the board of public works had taken any action as to accepting or rejecting the work done under the contract, the board, in rescinding an order of acceptance thereafter made, did not prejudice the rights of the assignee, since the assignee's position was no more advantageous than that of the contractor had no assignment been made. p. 696.

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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10. **MUNICIPAL CORPORATIONS.—Street Improvements.—Completion of Contract.—Authority of Municipality.**—An assignee of assessments for street improvements is not in position to complain of the refusal of the board of public works, after the rejection thereof for failure to comply with the contract, to take steps, by contract or otherwise, to complete the work in accordance with the contract, the city being under no duty to the contractor to cause the completion of the work. p.697.

From Marion Superior Court; *Linn D. Hay*, Judge.

Mandamus by the State of Indiana, on the relation of the German Investment and Securities Company, against the city of Indianapolis and others. From a judgment for the defendants, the relator appeals. *Affirmed.*

*Florea & Seidensticker* and *Harvey & Austill* for appellant.

*Samuel Ashby*, *Thomas D. Stevenson*, and *Harry E. Yockey*, for appellees.

**LAIRY, C. J.**—This is an appeal from a judgment in an action of mandamus brought by appellant against the city of Indianapolis and Joseph A. Rink, George B. Gaston and Ernest L. Ziegler, as members of the board of public works of said city. The purpose of the action was to compel appellees by mandate to take such steps as would lead to the adoption of a final assessment roll fixing a lien on property abutting on Thirty-sixth street in said city, between the east line of Pennsylvania street and the west line of Central avenue, to pay the cost of construction of an improvement of that portion of the street made under a contract between the city and the Bitu-Mass Paving Company. The interest of relator in the assessments to be made was acquired by an agreement by which the Bitu-Mass Paving Company, as contractor, assigned to it the assessment roll and all assessments to be made therein arising from the construction

of the improvement mentioned, to be held by the relator as collateral security for the repayment of a certain sum of money loaned by relator to the contractor and used by it in paying for labor employed and material used in the construction of said improvement. The case was tried by the court without the intervention of a jury. On proper request the court made a special finding of facts and pronounced its conclusions of law thereon in favor of appellee. Judgment was rendered on the finding in conformity with the conclusions of law. The only error assigned on appeal is that the trial court erred in its conclusions of law on the facts found.

The special finding shows that on July 11, 1910, the city of Indianapolis entered into a contract with the Bitu-Mass Paving Company, by the terms of which that company was to improve that part of Thirty-sixth street between the east line of Pennsylvania street and the west line of Central avenue, except the crossing of Washington boulevard, the improvement to consist of a bitu-mass roadway, with curbs and other incidental work according to certain plans adopted by the city. The proceedings under which the contract was let were instituted and conducted under the provisions of the statute of the state with reference to the improvement of streets by special assessments on real estate benefited by such improvements, and was originated by the board of public works of said city on May 20, 1910, by the adoption of a declaratory resolution providing for said improvement. It further appears from the finding that the contractor executed and filed a bond as provided by statute, with the Fidelity and Deposit Company as surety thereon, which bond was in the penal sum of \$4,120, conditioned for the full and faithful performance of said contract by the contractor. This bond was accepted and approved by the proper officers of the city. The finding sets out at length the conditions of

the bond, as well as certain provisions of the contract, the performance of which the bond was given to secure. It thus appears that the work to be done was to be completed according to the terms of the contract on or before September 10, 1910, and that the contractor was to pay all moneys due to subcontractors, or to persons furnishing material or labor for the prosecution of the work to be done under the contract. The court further found that the contractor entered on the execution of the work under the direction and supervision of the engineering department of the city, and that such work was so prosecuted until the contractor claimed that it was completed in accordance with the contract. As the work progressed the kind and character of the material used was inspected by the engineering department of the city, and on November 4, 1910, the civil engineer of said city reported to the board of public works that the work was completed according to the terms of the contract, and recommended that it be accepted by said board. On the same day the board of public works entered an order approving the report of the civil engineer, accepting the work, and directing the chief clerk of the assessment bureau to prepare the primary assessment roll for said improvement in accordance with the law. Thereafter the primary assessment roll was so made and approved by the board of public works, and the assessments so made aggregated the full amount of the contract price. The board fixed November 16, 1910, as the date on which the owners of property affected by the assessments for such improvement might be heard as to any objections to, or remonstrance against, such assessment, and the notice provided by statute was published. The hearing was not finished on the day fixed, but was continued from time to time; and on December 18, 1911, the board of public



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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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works entered an order rescinding all action previously taken and setting aside the acceptance of the work and the approval of the primary assessment roll, after which time it refused to further consider the making of a final assessment to pay the cost and expenses of such improvement.

Some parts of the roadway, as shown by the finding, were constructed of material not properly mixed or prepared, which parts crumbled away, and as a result holes of considerable size and depth were worn in the street, while other parts of the street remained in good condition; but the court finds that, as a whole, the improvement was no benefit to the abutting property. As the finding shows, the portion of the street covered by the work was opened to public use and travel on November 4, 1910, and was used by the public continuously, and was being so used at the time of the trial. During the time it was being so used the city on different occasions repaired worn places in the roadway by filling them with cinders and with asphaltum. The court finds that, before the commencement of the action, relator repeatedly demanded of the city that it take such steps as were necessary to cause said roadway to be made to comply with the contract, and that it do such things as would result in the making and confirmation of a final assessment roll to pay the cost of the improvement, but that the city, about thirty days before the commencement of the action, finally refused to take any such steps.

Relator, as shown by the finding, took an assignment from the contractor of all its beneficial interest in and to all assessments to be made by the city on account of work done under the contract and of the proceeds in cash or bonds to be collected and received by virtue of such assessments. This assignment was made October 8, 1910, for the purpose of securing to relator the repayment of money to be loaned to the contractor to be used

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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for paying the costs for the labor and material which entered into the construction of the work. On October 12, 1910, relator loaned said contractor in consideration of such security the sum of \$6,000, and on November 3, 1910, relator loaned the contractor on the strength of the same security the further sum of \$500, all of which was to bear interest at the rate of eight per cent. The sums so loaned to the contractor were expended in paying for labor and material used in the construction of the work. Shortly after November 4, 1910, the contracting company became insolvent and so remained at the time of the trial, and relator has no security for the repayment of the money so loaned, other than the rights and interests acquired by said assignment, and has no other means of collecting the amounts so due it from the contractor, although no part of the money so owing has ever been paid. The court also finds that, before taking the assignment and making the loan, the relator made inquiry of the engineering department of the city as to the completion of the work, and was informed by that department that the work had been completed according to the contract, and that the acceptance of the work would be recommended by the department to the board of public works.

It is well settled that a writ of mandate will be issued only in cases where the facts show a clear legal right on the part of relator to the relief sought,

1. and a clear legal duty resting on the defendants to do and perform the thing demanded. *State, ex rel. v. Graham* (1914), 183 Ind. 53, 108 N. E. 111; *Owen County Council v. State, ex rel.* (1911), 175 Ind. 610, 95 N. E. 253.

The assignment by the contractor of the assessments to be made on the completion of the street improvement, and its acceptance by the city, conferred on

2. the assignee an equitable interest therein, which

was subject to any defenses which might exist against his assignor. *Lynip v. Alturas School Dist.* (1914), 24 Cal. App. 426, 141 Pac. 835; *Chambers v. Lancaster* (1899), 160 N. Y. 342, 54 N. E. 707; *Summers v. Hutson* (1874), 48 Ind. 228. The interest so acquired is not different in kind or superior in character to the rights which the assignor would have possessed in case no such assignment had been made. Nothing can be claimed under the assignment until conditions have arisen which would have enabled the contractor to assert a claim successfully in the absence of such assignment. *Aetna Trust, etc., Co. v. Nackenhorst* (1919), ante 621, 122 N. E. 421, 123 N. E. 453, 125 N. E. 213.

Under the statute the contractor has no right to have the work finally accepted until it is completed in accordance with the terms of the contract, and no

3. duty rests on the board of public works of a city to accept such a work until it is so completed.

§8711 Burns 1914, Acts 1909 p. 412. Until the

4. work is completed and accepted, there is nothing upon which an assessment against the property affected by the work can be based, as the statute authorizes the making of such assessments only after the work has been finally accepted. It thus appears that relator had no right to require the board of public works of the city to make the final assessments to pay for the work, unless such work had been finally accepted. The special finding does not show that the work was finally accepted. While it appears from the finding that the board of public works made an order approving the report of the city engineers and accepting the work on November 4, 1910, and at that time opened the street to the use of the public, the finding also shows that the work was not properly constructed, and that, as a whole, it was of no benefit to the property affected. Upon discovering this fact, the board of public works

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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had a right to rescind its order accepting the improvement, which it did on December 18, 1911. Under such a state of facts the board of public works had no authority under the law to make an assessment of benefits against the property affected.

Relator attempts to invoke the equitable doctrine of waiver, relying on the eighth finding as showing a state of facts constituting a waiver by the city of its

5. right to reject the work after it was finished on account of material that had been inspected by the engineering department or of work that had
6. been done to the approval of that department.

The facts thus relied on are that the operations and work of the contractor, and the kind and character of the materials used in constructing the improvement, were supervised and inspected as the work progressed by the engineering department of the city. The theory of the relator is that, by permitting defective material, or material that was not properly prepared and mixed, to be put into the work after inspecting the same and supervising the work by its engineering department, the city thereby misled the contractor into the belief that the material and work were substantially in accordance with the contract and were acceptable to the city. It is asserted that it would be inequitable, and that it would work a great hardship on the contractor if the city, after the material had become a permanent part of the improvement, were to be permitted to assert that the material used or the work done did not conform to the contract, thus putting the contractor to the expense of removing the part of the work condemned and of reconstructing it with new material. There is a line of cases which hold that, where it is the intention of the contracting parties, as evidenced by the contract, that the owner shall have a representative on the ground whose duty shall be to inspect material and oversee the

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State, ex rel. v. City of Indianapolis—188 Ind. 685.

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work as it progresses, and to reject unsatisfactory material or inefficient work at once, the owner will be held to have waived, in the absence of fraud or collusion, any such defects as his representative, acting under such arrangement, observed or could have discovered by reasonable inspection. *Board, etc. v. O'Conner* (1894), 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *Schliess v. Grand Rapids* (1902), 131 Mich. 52, 90 N. W. 700; *Willey v. Fractional School Dist.* (1872), 25 Mich. 419; *City Street Improvement Co. v. Marysville* (1909), 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317; *Laycock v. Moon* (1897), 97 Wis. 59, 72 N. W. 372; *Ashland Lime, etc., Co. v. Shores* (1899), 105 Wis. 122, 81 N. W. 136.

The cases cited show that the rule has been held to apply to work done under contracts awarded by individuals and by private corporations, and also to

6. contracts awarded by municipal corporations in their corporate capacity for the construction of any work to be done at the general expense of the municipality; but the attention of the court has not been called to any case in which the rule has been applied to a local improvement to be paid for by assessments on property specially benefited. Such improvements are made and the assessments are imposed under special statutory authority, without which the municipality has no power to make assessments for such a purpose. *City of Bluffton v. Miller* (1904), 33 Ind. App. 521, 70 N. E. 989; *City of Fort Wayne v. Shoaff* (1886), 106 Ind. 66, 5 N. E. 403.

In awarding contracts and performing other duties imposed by the statute authorizing such proceedings, the municipal officers do not act in behalf of the

7. municipality in such a way as to create any liability against it under the contract. The contract
8. price of such an improvement can be paid only

from the proceeds of special assessments made under the authority of the statute, and the contractor is bound by the provisions of the statute which authorizes the contract, governs its execution, and provides for its acceptance. Under the statute, the city engineer had no power to accept the work done under the contract; that power was lodged in the board of public works, and it is the duty of that board to determine, before accepting the work, that it is completed in substantial accordance with the contract. The decision as to whether the work is in substantial accordance with the contract is *quasi-judicial* in its nature and when made is conclusive, in the absence of fraud, on all persons affected thereby. *Dawson v. Hipskind* (1909), 173 Ind. 216, 89 N. E. 863; *Town of Woodruff Place v. Gorman* (1912), 179 Ind. 1, 100 N. E. 296. Such a decision is immune from collateral attack, but it may be set aside by the court in a direct proceeding for that purpose based on fraud. *Alsmeier v. Adams* (1916), 62 Ind. App. 219, 105 N. E. 1033, 109 N. E. 58.

The board of public works is required to decide whether the work does or does not comply substantially with the terms of the contract. This must be

5. determined from a consideration of the facts showing the real character and condition of the improvement tendered for acceptance, unaffected by any considerations of waiver arising from the conduct of the engineers or inspectors who superintended the work. Such engineers have no authority to waive any substantial defects in material or workmanship, or to recognize any radical departure from the requirements of the contract.

It appears from the finding in this case that the defects were of such a substantial nature as to render the work absolutely worthless and of no benefit to the

4. property affected. If that fact had come to the

knowledge of the board at the time the work was tendered for acceptance, it would have been its duty to reject it; and the fact that an order of acceptance was entered on November 4, 1910, under a misapprehension as to the condition of the work, did not deprive the board of further power to act. If the true condition of the work was brought to its knowledge while engaged in hearing objections to assessments, it still had the power to set aside its former order of acceptance and to refuse to make any final assessments until the work was made to conform substantially to the contract, and it was the duty of the board to exercise that power, unless the rights of innocent parties had intervened so as to make such a course inequitable. The setting aside of an order of acceptance improvidently made works no injustice to the contractor in this case, and it does not appear that the delay in taking such action caused any loss to the relator or in any other way prejudiced its rights.

The relator accepted the assignment and parted with its money before the board of public works had taken any action as to accepting or rejecting the work

9. done under the contract. Therefore no claim can be made that the relator relied on the order of acceptance at the time of taking the assignment and making the loan, and that it was induced thereby to accept the security and make the loan when otherwise it would not have done so. Relator does not show that he was led by reliance on the order of acceptance to do anything which placed him in a more unfavorable position than he would have occupied in case the order had not been made. No question of estoppel is presented by the findings, and the relator stands in no more advantageous position than the contractor would have occupied in case no assignment had been made.

The relator is in no position to complain of the refusal of the board to take steps, by contract or otherwise,

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Nation v. Green, Exr.—188 Ind. 697.

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to complete the work and make it conform to the  
10. contract. The city was under no duty to the  
contractor to cause the work to be completed.  
*City of Auburn v. State, ex rel.* (1908), 170 Ind. 511, 83  
N. E. 997, 84 N. E. 990.

The trial court did not err in its conclusions of law,  
and the judgment is therefore affirmed.

Myers, J., dissents. Harvey, J., not participating.

NOTE.—Reported in 123 N. E. 405.

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NATION ET AL. v. GREEN, EXECUTOR, ET AL.

[No. 23,329. Filed April 17, 1919. Rehearing denied December  
19, 1919.]

1. APPEAL.—*Parties.—Improper Designation.—Effect.*—The improper designation of a party as appellant, instead of an appellee, does not justify a dismissal of the appeal. p. 699.
2. EXECUTORS AND ADMINISTRATORS.—*Costs of Administration.—Residuary Estate.*—The residuary estate is chargeable with only the ordinary and usual costs and expenses incident to the administration of the decedent's estate. p. 702.
3. EXECUTORS AND ADMINISTRATORS.—*Inheritance Tax.—Liability of Residuary Estate.—Wills.*—In view of §§5, 7 of the Inheritance Tax Act, Acts 1913 p. 79, §§10143e, 10143g Burns 1914, the residuary estate is not chargeable generally with the inheritance tax upon other transfers, where the will neither expressly, nor by clear implication, charged the residuary estate therewith. pp. 702, 704.
4. EXECUTORS AND ADMINISTRATORS.—*Inheritance Tax.—Collection.—Source of Authority.*—In the collection of the inheritance tax, the executor, administrator or trustee does not necessarily act in his capacity as such, but, under §5 of the act (Acts 1913 p. 79, §10143e Burns 1914), is personally responsible for the collection thereof as the agent of the state. p. 703.
5. EXECUTORS AND ADMINISTRATORS.—*Taxes on Land.—Life Estate.—Liability of Residuary Estate.*—Where a testatrix by the terms of her will placed a deed in the hands of her attorney to be delivered to her executors, which deed reserved a life estate in the land conveyed and provided that the same be held in trust by the executors after her death for the benefit of her minor foster daughter until the latter reached the age of twenty-one, when it was to be delivered to her as a



conveyance of the fee, the deed conveyed to the daughter no present interest, and therefore the taxes assessed on the lands during the decedent's life were chargeable against the residuary estate therein. pp. 704, 706.

6. **WILLS.**—*Devise to Executors in Trust.*—*Deed.*—*Vesting of Estate.*—Where a testatrix by provision in her will made a deed to her foster daughter a part of the will, and placed the deed in the hands of her attorney to be held until her death and then to be delivered to the executors of the will to be held by them until the daughter became twenty-one years old, or destroyed in the event of the daughter's death before she reached such age, in which event the title was to be disposed of under the terms of the will, the will and the deed created a trust in favor of the daughter, but did not convey a present interest, the title vesting in the executors in trust upon the death of the testatrix to go to the daughter by delivery of the deed on her attaining majority. p. 706.
7. **ESCROWS.**—*Deposit.*—*Release or Relinquishment of Deed.*—*Delivery.*—The statement of the testatrix in her will that she relinquished and released all right and control as to a certain deed, which, under the terms of the will, was to be held in trust by the executors of the will for the benefit of a minor child, is only one element of an irrevocable escrow or deposit, but is not controlling where other facts show the absence of such a delivery as is another and necessary element of such escrow or deposit. p. 708.
8. **LIFE ESTATES.**—*Liability for Taxes.*—*Failure to Receive Income.*—*Effect.*—A deed delivered to the grantee during the grantor's life containing no covenants of warranty nor agreement as to taxes, in which deed the grantor reserved a life estate and possession of the land, required that the life tenant pay the taxes during the life tenancy, provided she derived sufficient income therefrom, and, where there was no showing that she received any income, the land was liable for the taxes so assessed. p. 709.
9. **EXECUTORS AND ADMINISTRATORS.**—*Expenses.*—*Costs.*—*Trust Estate.*—*Minor Legatee.*—Where the executors of a will were also made trustees for the purpose of holding the legal title to certain land which was to pass to a foster child of the testatrix on her reaching the age of twenty-one, and the executors and trustees incurred expenses in defending a petition of the divorced husband of the testatrix for the appointment as guardian of such child and for a modification of the divorce decree as to the custody of the child, such costs and expenses were chargeable to the property held in trust for the child and not to the residuary estate. p. 709.

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Nation v. Green, Exr.—188 Ind. 697.

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10. GUARDIAN AND WARD.—*Appointment.—Nomination by Will.*—A guardian nominated by will is entitled, under §3066 Burns 1914, §2519 R. S. 1881, to appointment over all others, but his appointment, duties and powers are governed by the law regulating guardians not so nominated. p. 710.

From Howard Circuit Court; *Joseph Combs*, Special Judge.

Proceedings by William B. Green and wife, as executor and executrix of the last will of Lucinda E. Foreman deceased, against Barbara Nation and others. From a judgment for the petitioners, the named defendant and others appeal. (Transferred from the Appellate Court under §1397 Burns 1914, Acts 1901 p. 568.) *Reversed*.

*Harness & Moon* and *W. C. Overton*, for appellants.

*Blacklidge, Wolf & Barnes* and *Richard L. Ewbank*, for appellees.

HARVEY, J.—This cause was transferred to this court by the Appellate Court for want of jurisdiction in the latter. *Nation v. Green*, 65 Ind. App. 136, 116 N. E. 840.

We concur in said opinion wherein it holds that the making of Mrs. Scherer an appellant, rather than

1. an appellee, did not, and does not, justify the dismissal of this appeal.

Primarily, the question presented to the trial court was whether the sale of the real estate of decedent, Lucinda E. Foreman, to pay her debts, should be ordered. As an element of this question, the court was called upon to determine whether certain obligations were debts of the decedent; whether others were incidental costs and expenses of administration; and whether the inheritance tax involved was chargeable to the residuary estate.

The facts specially found by the court are in substance that Lucinda E. Foreman, the decedent and testatrix, was the wife of, and procured a divorce from, William

E. Wright; that the decree of divorce restored her name by a former marriage, Foreman, and granted her the care and custody of Wilma N. Wright, a child who had been adopted by Lucinda E. Wright and her then husband, William E. Wright. She was the only child of either, or both, and was when adopted eighteen months of age, and was less than six years of age when this litigation took place.

Mrs. Foreman, on March 30, 1914, executed a deed to her niece, Della Green, and her niece's husband, for 100 acres of land. This deed reserved to Mrs. Foreman the income from, and possession of, said land during her life, was conditioned for the support and care, if physical or mental disability of the grantor required, of the grantor and child until the latter became of age. This provision, so far as the child's interests were concerned, required all attention and care that parents would properly give such a child until she became of age, or earlier married.

Mrs. Foreman on the same day executed a deed to the child for another farm of 100 acres, and a will reciting the execution of both deeds, and the conditions of the deed to the Greens. The deed to the child and the will were delivered to the attorney who drew the same, the deed to be delivered to the executors of grantor's will, to be held by them and by them delivered to the child when she became of age, or destroyed in the event of the death of the child before coming of age.

The will contained a residuary bequest to the sister of the testatrix, Barbara Nation, appellant here, for life, and then to said sister's children. The mentioned residuary property was another farm of 26½ acres and a residence in Greentown, all of said property being in Howard county, this state.

The will named the niece and husband as executors; directed that the real estate conveyed and devised to

said child "be held by my executors until said Wilma N. Wright becomes twenty-one years of age; or if she dies before said age, then until her death, in trust for said Wilma N. Wright; and that all rents and profits and income of said one hundred acres of land \* \* \* be used in the care and support, maintenance and education of said Wilma N. Wright." The will appointed said niece and her husband "as guardians of my foster-daughter, who shall have the control and management of her until she reaches" said age. The will nominated and appointed said niece and her husband "as executor and executrix" and charged "them with the duty of carrying out and seeing that the provisions of" the will "are complied with."

The testatrix died within the following twenty days. The will was probated and not questioned, except that an effort was made by said adopting father to prevent the provisions of the will from being carried into effect, as hereinafter stated. The nominated executors qualified as such. They also applied for letters of guardianship. This application was resisted by the adopting father and divorced husband, Wright. He applied for letters of guardianship, and petitioned that the decree of divorce be so modified as to grant him the custody of his adopted child. This application and petition are resisted by the executors.

This appeal involves nothing pertaining to the rulings on the other petitions and proceedings. The only questions presented relate to the petition to sell real estate. Appellants' counsel say in their brief that "the whole litigation in this action arises out of the effort of these executors to unload upon the residuary legatees debts and expenses which should be borne by Green and Green as individuals, or as guardians of Wilma N. Wright." Consistent with this statement we find the

only errors and cross-errors assigned are upon exceptions to conclusions of law as to such matters.

No. 1 of the court's conclusions charges the residuary estate with "costs and expenses incident to the administration of decedent's estate." This is correct

2. when construed to cover only ordinary and usual costs and expenses. That the court did not intend to cover more is evident from the court's sixth conclusion, which deals with extraordinary and unusual expense, which may or may not be expense of administration. Of this sixth conclusion we shall treat later. The exception to the first conclusion was properly overruled.

The second conclusion stated by the court requires the residuary estate to pay all the inheritance taxes involved. The manner in which and the circum-

3. stances under which each transfer was made, whether by deed or will, are fully disclosed by the facts found; the relationship of each transferee to the decedent is found; the contingencies of the several estates taken are defined.

The statute clearly indicates that each of the transferees shall pay inheritance taxes; the exemptions and percentages applicable to each; the method of calculation, adjustment and repayment in event contingencies happen, which lessen the estate taken by one and thereby increase the estate taken by another. Section 10143e Burns 1914, Acts 1913 p. 79, §5, of the inheritance tax statute further provides that the taxes shall be a lien upon the property taken by the respective transferees; provides the method of collection of the taxes from the respective transferees. Section 10143g Burns 1914, Acts 1913 p. 79, §7, provides that: "If such legacy or property be not in money," the administrator, executor or trustee "shall collect the taxes thereon upon the appraised value thereof from the person entitled thereto."

And further provides that the executor, administrator or trustee "having in charge or in trust any legacy or property for distribution subject to such tax, shall deduct the tax therefrom." And further "if any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor or trustee and the tax shall remain a lien or charge upon such property until paid." And further "the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that the payment of the legacy might be enforced, or by the prosecuting attorney under section 16 of this act."

While it is true that said section also provides that "every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax, in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate," this, in view of the herein quoted parts of the statute, cannot be construed to mean that the executor, administrator or trustee is empowered to sell the property of one transferee to pay the taxes upon the property of another transferee. This last-quoted provision for sales must be held to define by comparison a "manner" of sale of such property only as is chargeable with inheritance taxes not otherwise paid or collectible and only of the interest therein of the defaulting heir, grantee, or legatee.

The executor, administrator, or trustee is not necessarily to act under this statute in his general capacity as such, but as an agent named by the state to

4. act for the state in making such collection. He is made personally responsible for such collection. §10143e Burns 1914, *supra*.

The provisions quoted make it clear that the residuary estate is not chargeable generally with the inheritance

tax upon other transfers. The will in this case  
3. does not expressly, nor by clear implication, charge the residuum therewith. The exception to the second conclusion should have been sustained.

Appellants' exception to conclusion No. 3 questions the charges to the residuary estate of taxes assessed during decedent's life upon the 100 acres going to

5. Wilma N. Wright. These taxes were properly chargeable against the residuary estate, unless the daughter, Wilma, took a taxable interest in this 100 acres during the life of her foster mother.

The facts found relating to this are: That on the same day that the mother executed her will she caused a deed to be prepared to Wilma, which was, quoting the court's findings, "executed in connection with and as a part of her will." That said will and deed were placed in the same envelope by said Lucinda E. Foreman, and were then placed in the possession and care of the attorney who drew the same, "and were never in the possession of any other person." That the testatrix intended by said deed to pass title to said grantee, Wilma N. Wright, conditionally, that is to say, on the condition that said grantee should live to the age of twenty-one years; that said deed was not to be delivered to said grantee until she arrived at the age of twenty-one years; and if she died before becoming of that age, said deed was not to pass title, but was to be destroyed, and the property to be disposed of under the will; that said executors were during the minority of said grantee to hold said land in trust for her."

The will itself expresses the following:

"Item 3: I have also this day executed a deed to my foster-daughter, Wilma N. Wright, for one hundred acres of land (describing the said 100 acres), and have placed the same with this, my last will and testament, and I hereby release and relinquish all right and control over and to said deed to

my executors hereinafter named, it being my desire and I direct that said deed be taken by my executors and placed of record, as hereinafter set forth. If I should die before said Wilma N. Wright reaches the age of twenty-one years, the said deed shall not be delivered to her before she reaches the age of twenty-one years. If the said Wilma N. Wright should die before reaching the age of twenty-one years, then I desire and direct that said deed be destroyed by my said executors, and the one hundred acres of land described herein shall be disposed of under the terms of this will, as hereinafter provided. However, if said Wilma N. Wright shall reach the age of twenty-one years, the said deed shall be delivered to her, as herein stated. I further direct that said deed shall be treated and acted upon as one of the provisions of this my last will and testament, and that the same shall be delivered and recorded as herein directed. It is my intention that the title in and to said real estate so described in said deed shall vest in Wilma N. Wright, either by virtue of said deed or by this will, provided she lives to be of the age of twenty-one years, and that, in the event she does not live to be twenty-one years of age, then neither she nor her heirs shall have any interest whatever in said real estate except in the manner provided in section seven (7) of this will."

"Item 7: Should I die before said Wilma N. Wright reaches the age of twenty-one years, I will and direct that the real estate conveyed and devised as aforesaid to said Wilma N. Wright be held by my executors until said Wilma N. Wright becomes twenty-one years of age, or, if she dies before said age, then until her death, in trust for said Wilma N. Wright, and that all of the rents, profits and income of said one hundred acres of land which I have devised to her be used in the care, support, maintenance and education of said Wilma N. Wright, which as hereinbefore stated, shall become hers absolutely when she reaches the age of twenty-one years."

These instruments created a trust and took effect at the death of the testatrix in the child's favor, and



a part of the trust was that the title should at

5. the death of the testatrix vest in the executors in trust, to go to the child from the executors by delivery of the deed. Such a deed, when a
6. release of all right of control thereover by the grantor is shown, ordinarily passes a present title, which, though not accompanied by all the rights and incidents of ownership, becomes complete at the death of the grantor. This is on the theory, however, that the delivery to the third person is, because of the certainty of the named event to happen, a delivery in effect to the grantee named. This rule applies when there is an absence of other stipulations, conditions or terms named by the grantor relating to delivery. Other such facts, however, here exist which show that the grantor had a purpose and intent that a present title should not pass to the child. Not by any chance did she intend that the daughter should take at the time this deed was handed to the mother's attorney, nor at the mother's death, an interest which might be inherited from the daughter. If the rule that such a deed of conveyance so deposited and beyond recall or power to change is applied in all its strength, then a full and indefeasible title in fee simple passed at the time of such deposit, subject only to possession and use of the grantor during her life. Such a result, accomplished by rules of construction, rather than by express word of the grantor as to the deposit, would be exactly contrary to her intent shown by her acts and words.

But it is said that the strong and well-understood meaning and effect of the language of the deed cannot be varied by acts and words contrary to the language of the deed. This rule has no application until there is such a delivery as calls the language of the deed into operation. The mother did not deposit this deed for delivery to the child. The depositary was directed to

deliver the deed and will to the executors of the will. The mother's directions at the time did not go beyond delivery by the attorney to the executors. When so delivered to the executors it is found that the mother's direction is in the will; that the will creates a trust in the executors for the child's benefit, and, under certain circumstances, for the residuary legatees covering the property described in the deed. Such a trust in the executors excludes the idea that the deed is to be delivered to the child, or operative as a conveyance to the child at the mother's death. The mother expressly declared in her will that the executors shall destroy the deed in the event of the daughter's death before reaching her twenty-first birthday. This, again, is contrary to the claim that the deed was intended to convey a present title to the child. A destruction of the deed cannot destroy such present title, if title has passed.

The mother declared in her will that, in event the child died before reaching such age, title should "be disposed of under the terms of this will." Such terms are: (Item 6) That if the child does not live to such age, this 100 acres is to "be considered and treated as a part of the residue of my property." Item 4 places the residuum of the estate in the hands of the executors for the benefit of Barbara Nation, sister of the testatrix, during her life; and item 5 directs that at the said sister's death said *executors* "*shall divide said property hereby placed in trust for my said sister between*" her children. Thus the mother evinced her intent that this deed should never become effective as a deed unless Wilma reached the age of twenty-one. She deemed it best to name this deed as an instrument whereby this title should pass to Wilma from the executors as trustees, the title meantime resting in the executors as trustees, to be divested by the act of the executors in delivering the deed. The executors are directed to part

with their title as trustees by this deed to the child, or to the sister's children by a *division made by the executors*.

In our opinion this deed has no efficacy, in itself, to pass title. In the absence of any mention of this deed, the child, on attaining her majority, would under the will have taken title, and, because of the peculiar wording of the will, would have been entitled to some evidence of a passing thereof from the executors as trustees. The mother directed that this deed be used for that purpose, and, when considered in connection with the will, it may fairly be said to accomplish that purpose. Such a construction of her acts and instruments is entirely consistent with her declaration in item 3, above quoted, that the deed is to be a part of the will, that the title shall vest in Wilma by virtue of the deed or the will, and that neither Wilma nor her heirs shall have any interest except as stated in item 7.

The mother's statement that "I hereby release and relinquish all right and control over and to said deed to my executor," if it has, under the circumstances,

7. any force, can have no more force than a declaration of a testator that he by depositing his will releases and relinquishes all control over the same. Such a statement does not bind him against a revocation. This deed and this will must, by reason of the facts and the declared intent of the testatrix be treated as one instrument; the deed was intended to be of no effect except as given life under circumstances stated in the will, and the will would be, at least, ambiguous without the deed. The statement that the deed is released and relinquished is only one element of an irrevocable escrow, or deposit, but is not controlling when other facts show the absence of such a delivery as is another and necessary element of such deposit or escrow.

Our conclusion is that the child took no present interest by virtue of this deed. This 100 acres remained the property of the mother during her life, and taxes accrued thereon prior to her death should be paid as other debts of her estate out of the residuum. The exception to conclusion No. 3 was properly overruled.

Appellants' exception to conclusion No. 4 raises a similar question as to taxes assessed during grantor's life upon the 100 acres deeded to the Greens.

8. This deed was made and delivered to grantees during the grantor's life; it contained no covenants of warranty, nor any agreement as to taxes. The fact that the grantor retained a life estate and possession of this land did not require more than that the life tenant pay the taxes assessed during her life tenancy, provided she derived income therefrom sufficient. *Clark v. Middlesworth* (1882), 82 Ind. 240. She died within twenty days after it was executed. There was no showing that she received any such income. The Green land was and is liable for the taxes referred to in this conclusion. The exception should have been sustained.

The exception to conclusion No. 5 is expressly waived by appellants.

As to the sixth conclusion: The executors employed counsel and incurred considerable expense in resisting the petition of the father that he be appointed

9. guardian, and his petition for a modification of the decree in the divorce proceeding as to the custody of the child, and in prosecuting a petition that they, the Greens, be appointed guardians. They were successful in such efforts. The court in its sixth conclusion of law required that the fees of such counsel and such expenses, aggregating about \$1,500, be charged to the interest taken by the child, and not to the residuary estate. This is assigned as cross-error.

The majority of the members of the court is of opinion that this expense is properly charged to the property set apart by the mother for the child's welfare. The decision of the question involved is based on the proposition that the executors, under the terms of the will, occupied a dual relation, and that in the discharge of their duties they acted in a dual capacity. They were executors of the will and, as such, they were also trustees holding the legal title to the real estate which would pass to the child, Wilma N. Wright, in the event she attained the age of twenty-one years. In their capacity of executors it was their duty to settle the estate of the testator in accordance with the terms of the will; and, in their capacity of trustees, it was their duty to control, manage and protect the trust property. It was also their duty to dispose of the income, as provided by the instrument creating the trust, and, ultimately, to turn over the *corpus* of the trust to the proper *cestui qui trust*. The costs incident to protecting their rights to the custody, control and management of the trust property is properly chargeable to the trust estate, and not to the residuary legatees under the will. A guar-

dian nominated by will is entitled by statute to  
10. appointment over all others, but his appointment, duties and powers are governed by the law regulating guardians not so nominated. §3066 Burns 1914, §2519 R. S. 1881.

The writer, with whom concurs Justice Willoughby, while conceding all said propositions when other controlling facts are absent, are of opinion that here such other facts are not absent. A testator may do with his own as he pleases; and when his intent is ascertained, if the same can be legally carried out, the law does not, and the courts cannot, substitute means of accomplishing the intent other than those the testator dictated. The will here is conceded to be valid. The will

not only directs to whom title shall pass, but what title and how the property shall be controlled and enjoyed. The testatrix expressed her disapproval of statutory guardianship for the custody and care of her child and its property by naming other custody and caretakers. She realized the danger, in that the foster father might become such guardian; and to prevent this, she exercised in her will her right to nominate a guardian. We see no other occasion for appointing a guardian. In her mind this was necessary to prevent the failure of her express desire that her executors, as such, should perform the duties that a guardian would perform, and more, for her child. For this purpose she declared the executors should have the custody of the child and its property interests, and the application of the proceeds of the property. It being necessary that the legal title, or fee, of the property rest somewhere until it was ascertained whether it should go to the child or into the residuum, she placed it, not in the guardians, nor in others as trustees, but in the executors as trustees. She defined no duties for the trustees, as such, to perform except to hold this property and to eventually deliver her deed to the child, or to divide between the heirs of her sister. All other duties were to be performed by the executors. She had the right to, and she did expressly, name all these terms. She expressly declared that her niece and her niece's husband should be executors, and charged "them with the duty of carrying out and seeing that the provisions of" the will "are complied with." The only actors designated by her to perform any duty under the will, pending the child's minority, are the executors, not the guardians nor the trustees.

It is true, she does not expressly direct that the expenses of maintaining the conditions created by her will, nor of seeing that "the terms of my will are complied with," be paid out of her estate generally. But,

on the other hand, she does not say such expenses shall be charged to property in the hands of a guardian, nor of the trustees. The result is that as such expenses are not by the testatrix expressly charged against any particular estate or interest, they are chargeable to that interest which is subject to the payment of the expenses of carrying out and complying with the provisions of her will. In this case the residuary was, in our opinion, chargeable with such expenses. Considering the family history, and the facts surrounding the grantor and testatrix at the time she executed these documents; considering her fears of the man who had been decreed unfit to care for the child, and her anxiety for the child's best interests, we are driven to the conclusion that all else was in the testatrix' mind secondary, and the child's interests were to be first, and always first, protected by the niece and her husband, acting as executors. She clearly expressed in her will this as her desire and intention as above all other considerations, including considerations for the residuary legatees, who are never entitled to anything until all other terms of a will are complied with. The court found as a fact that counsel was employed and these expenses incurred by the executors. The court did not find that this was done by the Greens as individuals, nor as guardians, nor as trustees. They could not have performed the duties imposed upon them by the will without so doing. Under this will it was not necessary that the efforts and acts of the executors be for the benefit of the entire estate, nor of any other interest therein, to justify a charge against the residuary estate.

The prevailing opinion, however, leads to the conclusion that the cross-error is not sustained. The court is, however, directed to carefully revise said costs and charges for services, and separate the same as to said various proceedings and parties, in order that said

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Roberts v. State—188 Ind. 713.

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child's interest shall be charged only with that part thereof caused by said trustees.

Because the errors assigned on conclusions Nos. 2 and 4 are sustained, the judgment below is reversed; and the court is directed to restate said conclusions in accordance herewith, and to enter such order, or judgment, as is consistent herewith; and it appearing that one of the parties has died since the submission of this cause, the judgment is reversed as of the date of submission.

NOTE.—Reported in 123 N. E. 163.

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### ROBERTS v. STATE OF INDIANA.

[No. 23,512. Filed November 5, 1919. Rehearing January 7, 1920.]

1. **CRIMINAL LAW.—Continuance.—Absence of Counsel.**—Where the defendant's motion for a continuance, filed on the day of trial, rested solely on his own affidavit, which stated as a ground that the attorney depended on to make an active defense for him declined to appear because of his wife's illness, and that the defendant had no knowledge thereof until the day before the trial, the court on appeal will not disturb the overruling of the motion as an abuse of discretion, where there is a showing of record that at least ten days prior to the day set for the trial the defendant was represented by other counsel, and that throughout the trial he was ably represented. p. 715, 716.
2. **CRIMINAL LAW.—Continuance.—Discretion of Court.**—A motion for a continuance, filed on the day of trial, on the ground that one of the defendant's attorneys declined to appear because of the illness of his wife, calls into action the sound discretion of the trial court, there being no statute making the absence of counsel a ground for continuance, except where the attorney for the party applying is a member of the general assembly. p. 716.
3. **CRIMINAL LAW.—Continuance.—Absence of Witness.**—Where a defendant seeking a continuance because of the absence of a witness brings himself within the requirements of the statute, he can demand a continuance as a matter of right, unless the prosecuting attorney will admit the truth of the facts which the defendant alleges that he can prove by the absent witness. p. 716.



4. **CRIMINAL LAW.—Continuance.—Judicial Knowledge.—Matters of Record.**—Where a motion for continuance calls into action the discretion of the trial court, the court will take judicial knowledge of the pending proceedings, the facts disclosed by the record and all the circumstances obviously open to it as a basis for exercising its discretion. p. 716.
5. **CRIMINAL LAW.—Appeal.—Discretion of Court.—Presumption.**—A motion for continuance, because the defendant's counsel declined to appear on account of his wife's illness, called for the judicial discretion of the trial court, and the court on appeal will assume that a ruling denying the motion was made in the belief that no injustice would result to the defendant thereby; the ruling of the trial court under such circumstances will not be disturbed on appeal, unless it clearly appears that there was an abuse of discretion to the harm of the defendant. p. 717.
6. **CRIMINAL LAW.—Conspiracy.—Evidence.—Declarations of Coconspirators.**—In a prosecution for conspiracy to commit a felony, under §§2647, 2260 Burns 1914, Acts 1905 p. 584, §§641, 371, there was no error in admitting evidence of declarations of the defendant's coconspirators, made in the absence of the defendant eight months before the commission of the alleged felony, in view of evidence warranting the inference that the defendant, though not one of the original conspirators, joined the conspiracy. p. 718.
7. **CONSPIRACY.—Acts of Coconspirators.—Joining Existing Conspiracy.**—One who connects himself with an existing conspiracy and joins in carrying out the common purpose and design will be deemed in law a party to every act which had before been done by the others and which may afterwards be done by any of the others in furtherance of the design. p. 718.
8. **CONSPIRACY.—Proof.—Existence and Nature.**—The existence or nature of a conspiracy cannot be established by the acts or declarations of one conspirator in the absence of the others, unless the acts or declarations were in themselves in execution, or for the promotion, of the common design. p. 721.
9. **CONSPIRACY.—Existence of.—Joining Conspiracy.—Jury Questions.**—Whether certain defendants entered into a common purpose or design to commit, or to procure to be committed, the crime charged, and whether another connected himself with such common purpose, were questions of fact for the jury. p. 721.

From Randolph Circuit Court; *W. H. Eichhorn*, Special Judge.

Prosecution by the State of Indiana against Elisha Roberts. From a judgment of conviction, the defendant appeals. *Affirmed.*

*Macy, Nichols & Bales*, for appellant.

*Ele Stansbury*, Attorney-General, *Newman T. Miller* and *Dale F. Stansbury*, for the state.

MYERS, J.—Appellant on an affidavit filed in the Randolph Circuit Court was tried and convicted of a felonious conspiracy to commit a felony. §§2647, 2260 Burns 1914, Acts 1905 p. 584, §§641, 371. From a judgment against appellant, assessing a fine of twenty-five dollars and imprisonment in the state prison for a period of not less than two years nor more than fourteen years, he prosecutes this appeal. The affidavit which includes three other persons as conspirators is not questioned. The overruling of appellant's motion for a new trial is the only error properly assigned and relied on for a reversal of the judgment.

Appellant, to support his motion for a new trial, insists: First, that the court erred in overruling his motion for a continuance. This motion rests solely

1. on his own affidavit, filed on the morning of the day the cause was set for trial, March 26, 1918, wherein he states in substance that some weeks prior to this time he employed one George H. Ward, an attorney of the Randolph county bar, as his local counsel, and on whom he depended to make an active defense for him; that since the employment aforesaid, Ward's wife has become seriously ill and is now in a hospital in the city of Indianapolis, where she will likely remain for an indefinite time; that by reason of such illness, Ward declines to enter upon the trial at this time because of emergencies that may arise relative to the condition of his wife, and of this information he had no knowledge until March 25; that he had no means of ascertaining

Ward's decision not to enter upon the trial because of the fact that Ward had not been in Randolph county during the week of March 18; that affiant has not engaged or employed any other counsel within the jurisdiction of Randolph county, and at this late hour he cannot safely engage the services of other counsel, as he verily believes, who could and would be able to familiarize themselves with matters necessarily required to protect his interest.

We know of no statute which makes the absence of counsel a ground for postponing the trial of a cause, except where the attorney for the party applying is

2. a member of the general assembly of the State of Indiana. §420 Burns 1914, Acts 1893 p. 16. An application such as we have here calls into ac-
3. tion the sound discretion of the trial court, and is distinguishable from one where a party is seeking a continuance on account of the absence of evidence. In a case of the latter character, where a party brings himself within the requirements of the statute, he can demand a continuance as a matter of right, unless the prosecuting attorney will admit the truth of the facts which the defendant alleges that he can prove by the absent witness. §2089 Burns 1914, Acts 1905 p. 584, §218. *Weaver v. State* (1899), 154 Ind. 1, 3, 55 N. E. 858; *Pettit v. State* (1893), 135 Ind. 393, 34 N. E. 1118; *Morris v. State* (1886), 104 Ind. 457, 4 N. E. 148; *Torphy v. State* (1919), ante 30, 121 N. E. 659, 660; *Moulder v. Kempff* (1888), 115 Ind. 459, 17 N. E. 906.

The trial court in matters of this character will take judicial knowledge of the pending proceedings and the facts disclosed by its records, and all facts and

4. circumstances obviously open to it as a basis for exercising its discretion. *Detro v. State* (1853), 4 Ind. 200. In this case the record shows that
1. at least ten days prior to the day this cause was

set for trial appellant was actively represented by counsel other than Ward pertaining to the taking of depositions, and six days before this same attorney examined the witnesses whose depositions were taken in appellant's behalf, and in court made and presented the motion supported by the affidavit heretofore mentioned, for the continuance of the trial. It does not appear that counsel, who was then and had been representing appellant for some time prior thereto, made any statement in any form to the court that he or they were not familiar with the facts and the law pertaining to appellant's defense, or that by reason of the time of their employment no opportunity was afforded them to properly prepare and present his defense. But from the record before us it clearly appears that appellant throughout the trial was well and ably represented by counsel.

As we have said, the motion in question called for the judicial discretion of the trial court, and we must assume that its ruling in this respect was made in

5. the belief that no injustice to appellant would be done thereby. A ruling under such circumstances will not be disturbed by this court, unless it clearly appears that the lower court abused its discretion to the injustice and harm of the complaining party. We are not convinced that the affidavit filed in support of the motion made a case which left the court no legal option to refuse to grant a postponement of the trial. *Wheeler v. State* (1902), 158 Ind. 687, 697, 63 N. E. 975; *Mead v. Burk* (1900), 156 Ind. 577, 583, 60 N. E. 338; *Evansville, etc., R. Co. v. Hawkins* (1887), 111 Ind. 549, 13 N. E. 63; *Louisville, etc., Traction Co. v. Montgomery* (1917), 186 Ind. 384, 115 N. E. 673.

Appellant next insists that the court erred in admitting declarations of his codefendants, Pierson and Drake, made in his absence about eight months before the alleged arson was committed.

The fire occurred July 10, 1916, and a witness called by the state was permitted to testify, over the objection of appellant, that during a conversation between

6. him and Pierson and Drake at their store in November, 1915, Pierson, in the presence of Drake, offered the witness \$100 to burn their store, and

7. Drake offered to give him an additional \$50. At the close of the state's evidence appellant moved to strike out the statements of Pierson and Drake on the ground that he was not present at the time they were made; that they were immaterial, and because a *prima facie* case of conspiracy had not been shown. As we see this case, appellant was not one of the original conspirators. If under the evidence before us he was at all guilty, it was by joining a conspiracy already formed to do the unlawful act charged. By considering only the evidence most favorable to the state, an inference of such fact might be drawn, and, if so, we must assume that the jury so found. With that fact established, the rule is that one who connects himself with an existing conspiracy and joins in carrying out the common purpose and design will be deemed in law "a party to every act which had before been done by others and a party to every act which may afterwards be done by any of the others in furtherance of such design." 1 Greenleaf, Evidence (15th ed.) §11; *Card v. State* (1887), 109 Ind. 415, 9 N. E. 591; *Wilton v. State* (1882), 88 Ind. 9; *Jones v. State* (1878), 64 Ind. 473.

A conspiracy can seldom be made out by direct evidence, consequently, the necessity for the rule permitting it to be established by circumstantial evidence or by isolated and independent facts. *Cook v. State* (1907), 169 Ind. 430, 82 N. E. 1047. It appears that in September, 1915, Pierson and Drake purchased the stock of goods situated in a ground-floor room of a

building in Ridgeville, Indiana, and where they as owners thereof were operating the store at the time of the fire. The building belonged to another person who occupied an adjoining room with a stock of merchandise. The two rooms were separated by a brick partition wall, except two arch openings, which were closed by wood material. About two months before the fire Pierson questioned the clerk in the adjoining store as to whether the partition wall was brick, and how far up it extended. About two weeks before the fire he asked the owner of the building regarding the material of the partition, and also as to the amount of insurance he was carrying on the building, estimated to be worth \$6,000, and was told \$2,000 on the building and stock. Pierson then remarked, "You are not carrying enough." At the time of the fire Pierson and Drake had \$12,000 insurance on their stock, but there is no evidence tending to show that it was over insured. Pierson and this appellant resided in Van Buren, Indiana. Drake had a room over the store where he did light housekeeping. His family was there part of the time. All of these parties had been intimately acquainted with each other for at least two years. There is no evidence as to the whereabouts of either Pierson or Drake on the night of the fire. Appellant and Pierson were well acquainted, and thirty days or less before the fire appellant was seen at the home of Pierson. It appears that Pierson to some extent was engaged in trading or buying and selling stocks of goods, and appellant assisted him in some of these deals. At the time of the fire appellant owned a small one-seated automobile, color, gray, and right-hand drive. There is evidence tending to show that this car was in Ridgeville about eleven or twelve o'clock on Sunday night before the fire, which occurred about one o'clock the next morning. Only one person was seen in the car. The undisputed evidence is to the effect that the

car was out of repair. The car was first seen on Main street going slowly east, and in about ten minutes it was going west. In a short time a man came from the direction in which the car was last seen going, and inquired where he could find a garage. This man, in the opinion of the witness, was Calvin Lincoln, who was also identified as being at a restaurant the same night. He is included in the affidavit with Roberts, Pierson and Drake. Lincoln and appellant, on July 7 and July 11, worked together on the farm of appellant's father, and knew each other prior to that time, but there is no direct evidence showing them together between these dates. The deputy marshal of Ridgeville immediately before discovering the fire saw a man come out of the Pierson and Drake store, who he says was neither Pierson nor Drake, and on calling to him he ran south about ten feet and then west down an alley. He was from seventy-five to eighty-five feet from the man who as he came out faced a 100-watt street light. The witness testified that in his opinion the person who came out of the store that night was this appellant. It also appears that Main street runs east and west and is the second street south of the Pierson and Drake store. The first street west of the store is known as Race street, and west of Race street the Pennsylvania Railroad tracks intersect Main street. The testimony of three witnesses tends to show that at about the time the fire alarm was sounded a medium-sized man, in appearance resembling appellant, was seen on Main street, running west across the railroad and in the direction of the automobile. Another witness testified that about twelve o'clock he went out Main street, and just outside of the corporate limits of the town he passed a small automobile, standing by the side of the road without lights. A little later he came back, and the lights were lighted, and a man was standing in front of them. As he approached the

railroad he saw a medium sized man on Main street running toward him and from the direction of the Pierson store. When this man reached the railroad, he dodged behind the watchman's shanty. Soon after the witness crossed the railroad he heard the fire alarm, and the store was burning.

As to the particular declarations of which the appellant complains, it may be said that: "The existence or nature of a conspiracy cannot be established by

8. the acts or declarations of one conspirator in the absence of the others, unless the acts or declarations were in themselves in execution, or for the promotion, of the common design." *Moore v. Shields* (1889), 121 Ind. 267, 23 N. E. 89. The declarations in question were admissible as tending to show the mental state of Pierson and Drake at the time, and their purpose of promoting their common design through one whom they might procure to do the act. These declarations, when made, could have no bearing or probative force against appellant, unless, as we have seen, he connected himself in the promotion or consummation of the evil purpose charged, and we may assume, in the absence of the instructions given, that the court so instructed the jury. As said in the case of *Walton v. State*, *supra*, 17: "Standing alone, of course these declarations amounted to but little, if anything; but, when coupled with other facts and circumstances in evidence, their tendency was to show that the alleged conspiracy was even then afoot."

The question whether or not Pierson and Drake had entered into a common purpose or design to commit, or to procure to be committed, the crime charged,

9. and whether or not appellant connected himself with that common purpose, were questions of fact for the jury alone. For the purpose of determining



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Pittsburgh, etc., R. Co. v. Gallivan—188 Ind. 722.

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these questions, the jury had a right to infer the actual fact of conspiring from all of the circumstances satisfactorily proved without any direct proof of concurring conduct of the defendants. "Any joint action on a material point, or collocation of independent but co-operative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment." 2 Wharton, Crim. Law (9th ed.) §1398; *Archer v. State* (1886), 106 Ind. 426, 432, 7 N. E. 225.

The court did not commit reversible error in admitting the questioned evidence.

Judgment affirmed.

NOTE.—Reported in 124 N. E. 750. Conspiracy: definition and general principles, 51 Am. Dec. 82; evidence of, 3 Am. St. 482. See under (7-9) 12 C. J. 577, 638, 642.

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PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. GALLIVAN.

[No. 23,211. Filed Jan. 7, 1919.]

From Marion Superior Court (101,767); *V. G. Clifford*, Judge.

Action by Thomas J. Gallivan against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for the plaintiff, the defendant appeals. *Reversed*.

*Pickens, Moores, Davidson & Pickens, C. B. Heiserman* and *E. H. Seneff*, for appellant.

*M. L. Clawson*, for appellee.

SPENCER, J.—The issues presented by this appeal are identical with those which were considered in *Pittsburgh, etc., R. Co. v. Miller* (1918), 187 Ind. 684, 119 N. E. 801, and, on the authority of that decision, we hold in this case that the trial court erred in sustaining appellee's demurrer to appellant's fifth paragraph of answer.

Judgment reversed, with instructions to overrule the demurrer to said fifth paragraph of answer and for further proceedings not inconsistent herewith.

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Pittsburgh, etc., R. Co. v. Kruger—188 Ind. 723.

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## STATE OF INDIANA v. SURETY COUPON COMPANY

[No. 23,373. Filed April 8, 1919.]

From Vigo Circuit Court; *Charles L. Pulliam*, Judge.

Prosecution by the State of Indiana against the Surety Coupon Company. From a judgment quashing the affidavit and discharging the defendant, the state appeals. *Affirmed.*

*Ele Stansbury*, Attorney-General, *U. S. Lesh*, *Elmer E. Hastings*, *Dale F. Stansbury*, *John F. Robbins*, *Louis D. Leveque* and *William E. Horsley*, for the state.

*Jones*, *Hammond & Jones*, and *Beasley Douthitt*, *Crawford & Beasley*, for appellee.

LAIRY, J.—This is an appeal by the State of Indiana from a judgment discharging the defendant, after a motion to quash the indictment by which it stood charged had been sustained. The ruling of the court in sustaining the motion to quash is assigned as error.

The indictment in this case is based on the same statute which was considered in the recent case of *Sperry, etc., Co. v. State*, ante 173, 122 N. E. 584. In that case the statute was held invalid as being in conflict with §23 of the Bill of Rights of this state, and also with §1 of the fourteenth amendment to the federal Constitution. Acts 1915 p. 674.

On the authority of the case cited, the judgment of the trial court is affirmed.

Harvey, C. J., did not participate in consideration or decision of either cause above mentioned.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. KRUGER.

[No. 23,339. Filed May 13, 1919.]

From the Marion Superior Court (102,517); *V. G. Clifford*, Judge.

Action by William Kruger against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Samuel O. Pickens*, *Charles W. Moores*, *R. F. Davidson*, *Owen Pickens*, and *D. P. Williams*, for appellant.

*H. N. Spaan*, for appellee.

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Indianapolis Telephone Co. v. State—188 Ind. 724.

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LAIRY, J.—This is an appeal from a judgment in favor of appellee for the sum of \$249.85. This court has jurisdiction of the appeal for the reason that a constitutional question is presented, but in view of the conclusion reached it will not be necessary to consider the question thus presented. The complaint shows that appellee was employed by appellant as a railway conductor for a number of years from 1905 to 1914, and seeks to recover a balance alleged to be due him as wages on the ground that appellant, during the time he was so employed, deducted from the amount due him each month the sum of \$3.75, aggregating the amount demanded in the complaint. Appellant filed an answer in six paragraphs, and the trial court sustained a demurrer addressed separately to the fourth, fifth and sixth paragraphs of this answer. These rulings of the court are separately assigned as error.

In the recent case of *Pittsburgh, etc., R. Co., v. Miller* (1918), 187 Ind. 684, 120 N. E. 706, this court decided that the trial court erred in sustaining the demurrer addressed to a paragraph of answer substantially the same as the sixth paragraph of answer in this case. The substance of the answer and the reasons upon which the decision is based are stated in that opinion, and need not be here repeated. For the reasons there stated the sixth paragraph of answer in this case stated facts sufficient to constitute a defense, and the demurrer addressed thereto was improperly sustained.

The judgment is reversed, with instructions to overrule the demurrer to the sixth paragraph of complaint.

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INDIANAPOLIS TELEPHONE COMPANY v. STATE OF  
INDIANA.

[No. 23,584. Filed June 6, 1919.]

From Marion Circuit Court; *Louis B. Ewbank*, Judge.

Action by the State of Indiana against the Indianapolis Telephone Company. From the judgment rendered, the defendant appeals. *Reversed.*

*L. Ert Stack, Charles M. Bracelen, Foster & Smith, and Myers, Gates & Ralston*, for appellant.

*Ele Stansbury*, Attorney-General, *U. S. Lesh*, and *Dale F. Stansbury*, for appellee.

PER CURIAM.—In this case the appellee confesses error of record. The judgment is therefore reversed and this case is remanded for further proceedings.

# INDEX

[NOTE.—The citation *Indiana Pipe Line Co. v. Christensen*, 400, 408(8), indicates that the opinion begins on page 400, that the point cited is on page 408, and that the point is numbered 8 in the margin.—REPORTER.]

## ABATEMENT—

Plea, see CRIMINAL LAW 14-18.

## ACTION—

1. *Forms.—Common Law.*—Though the common law forms of actions are abolished in this state, the rules of common law are not abrogated, and they obtain in civil actions under the Code whenever applicable to the facts pleaded and proved.  
*Indiana Pipe Line Co. v. Christensen*, 400, 408 (8).
2. *New Remedies.—Cumulative.*—New remedies are cumulative and not exclusive, unless the act creating them so declares expressly or by clear implication.  
*Vandalia R. Co. v. Schnull*, 87, 91 (4).
3. *Permanent Injury.*—Where a single completed act causes an injury to real estate, the effects of which will continue indefinitely, the damages occasioned thereby must be entirely compensated in a single action, since there is no continuing wrong upon which to base successive actions.  
*Indiana Pipe Line Co. v. Christensen*, 400, 404 (3).
4. *Statutory Remedies.—Exclusiveness.*—Where a statute creates a right that did not exist at common law, and for the new right a remedy is prescribed by the act, the whole matter of right and remedy is within the act and no part of either otherwise exists.  
*Vandalia R. Co. v. Schnull*, 87, 90 (1).
5. *Trespass on the Case.—Defense.—Successive Actions.*—In an action for injuries to the plaintiff's land caused by crude oil that was carried from the defendant's defective pipe line by the waters of a creek and deposited on a portion of such land, where it is not the plaintiff's theory that such portion has been wrongfully appropriated for the purpose of flowing oil thereon throughout the future, and the evidence shows the plaintiff to be in possession of all the land in the condition in which it was left after the water receded and fails to show a continuous or intermittent flow of oil causing injury so long as such pipe line is operated, the entire damage must be recovered in a single action and the recovery limited to damage resulting from the oil permitted to flow upon the land prior to the commencement of the action.  
*Indiana Pipe Line Co. v. Christensen*, 400, 411 (11).

## "ACTIONABLE FRAUD"—

Definition, see FRAUD 2.

**ACTION ON THE CASE—**

*Pollution of Stream.—Injury to Riparian Owner's Land.*—Under the common-law forms of pleading, trespass on the case is the proper form of remedy for injuries occasioned by oil carried by the waters of a creek from a defective pipe line and deposited on land, since the injury is not the direct result of force, but the indirect result of a wrongful act.

*Indiana Pipe Line Co. v. Christensen*, 400, 408 (7).

**ACT OF GOD—**

Defense, when applicable, see **CONTRACTS** 2, 3.

**ADMINISTRATORS—**

See **EXECUTORS AND ADMINISTRATORS**.

**ADMISSIONS—**

See **EVIDENCE**; **PLEADING** 7.

**AFFIDAVITS—**

See **CRIMINAL LAW** 8, 9; **INDICTMENT AND INFORMATION**.

**AGRICULTURE—**

Experiment station, appropriations. see **COLLEGES AND UNIVERSITIES**.

**ALIMONY—**

See **DIVORCE**.

**AMENDMENT—**

See **PLEADING** 12, 13.

Commissioners' report, time, definiteness see **DRAINS** 2, 4.

**APPEAL.**

|                                             |                                                      |
|---------------------------------------------|------------------------------------------------------|
| I. PRESERVATION OF GROUNDS OF REVIEW, 1, 2. | VII. REVIEW.                                         |
| II. PARTIES, 3.                             | (a) SCOPE AND EXTENT, 14.                            |
| III. STAY OF PROCEEDINGS, 4.                | (b) PARTIES ENTITLED TO ALLEGE ERROR, 15-17.         |
| IV. RECORD—PREPARATION AND CONTENTS, 5-9.   | (c) PRESUMPTIONS, 18-20.                             |
| V. ASSIGNMENT OF ERRORS, 10                 | (d) QUESTIONS OF FACT, VERDICTS AND FINDINGS, 21-30. |
| VI. BRIEFS, 11-13                           | (e) HARMLESS ERROR, 31-43.                           |
|                                             | (f) WAIVER OF ERROR, 44, 45.                         |
|                                             | (g) SUBSEQUENT APPEALS, 46.                          |

See also **COURTS** 3, 5, 6; **EXCEPTIONS**, **BILL OF**; **TRIAL**.

Appeal of criminal cases, see also **CRIMINAL LAW**.

Highway proceedings, appeal, jurisdiction of circuit court, see **HIGHWAYS** 2, 5.

Appeal to circuit court from an order fixing rates, see **PUBLIC SERVICE COMMISSION**; **TELEGRAPHS AND TELEPHONES**.

**I. PRESERVATION OF GROUNDS OF REVIEW.**

1. *Review.*—Where appellant failed to present objections to an instruction in his motion for new trial, the instruction will not be reviewed on appeal.

*Mishler v. Chicago, etc., R. Co.*, 189, 191 (1).

## APPEAL—Continued.

2. *Review.—Motion for New Trial.—Grounds of Review.*—Where no question was presented by the appellant's motion for new trial, alleged error "in permitting a witness to testify as an expert" presents no question for review.  
*Mishler v. Chicago, etc., R. Co.*, 189, 191 (2).

## II. PARTIES.

See also 17.

3. *Improper Designation.—Effect.*—The improper designation of a party as appellant, instead of an appellee, does not justify a dismissal of the appeal. *Nation v. Green, Exr.*, 697, 699 (1).

## III. STAY OF PROCEEDINGS.

4. *Suspension of Proceedings.*—The bond filed in perfecting a term-time appeal stays all proceedings for the enforcement of the judgment during the pendency of the appeal, and suspends the authority of a receiver appointed therein to take charge of the property affected during such time.  
*George Kraft Co. v. Heller*, 612, 619 (4).

## IV. RECORD—PREPARATION AND CONTENTS.

See also 12.

5. *Bill of Exceptions Containing Evidence.—Sufficiency.*—If a bill of exceptions purporting to contain all the evidence discloses on its face that it does not contain all the evidence given at the trial, then the court on appeal will not consider the evidence for the purpose of determining whether it sustains the finding.  
*Chicago, etc., R. Co. v. Public Service Commission*, 334, 340 (4).
6. *Grounds for New Trial.—Review.*—That the decision is not sustained by sufficient evidence, assigned as a ground for new trial, presents no question for review on appeal, in the absence of the evidence from the record. *Lawler v. Bear*, 308, 311 (3).
7. *Bill of Exceptions.—Filing.*—Where a record fails to show a compliance with §661 Burns 1914, Acts 1911 p. 193, relative to the extension of time for the filing of a bill of exceptions, but shows that the statute was ignored, an order extending the time therefor was void, and a bill of exceptions filed during the extended time is not in the record.  
*Fauvre Coal Co. v. Kushner*, 314, 327 (11).
8. *Matters Reviewable.—Bill of Exceptions.*—Objections to the giving of instructions which necessitate a consideration of the evidence present no question for review where neither the bill of exceptions by which the appellant attempted to make the instructions part of the record, nor that containing the evidence, was filed during the term in which the cause was tried or during the time given for that purpose.  
*Sisk v. State, ex rel.*, 328.
9. *Matters Reviewable.—Instructions.*—An objection that the court erred in giving certain instructions because they were not applicable to the evidence and because they assumed certain facts to be true, where there was conflict in the evidence, presents no question for review in the absence of the evidence from the record.

*Fauvre Coal Co. v. Kushner*, 314, 328 (12).

## APPEAL—Continued.

## V. ASSIGNMENT OF ERRORS.

See also 11.

10. *Sufficiency of Complaint.*—Where a complaint was not challenged by demurrer for insufficiency of facts, it may not be challenged on appeal on such ground by independent assignment of error, in view of §344 Burns 1914, Acts 1911 p. 415.  
*Jackson, Rec., v. Rutledge, 415, 420 (1).*

## VI. BRIEFS.

See also 44; CRIMINAL LAW 76-84.

11. *Failure to File.—Dismissal.*—Where an appellant filed no briefs in support of his assignments of error, the appeal will be dismissed.  
*Sourbier v. Brown, 554, 572 (19).*
12. *Record on Appeal.—Sufficiency.*—Alleged error in overruling a demurrer to a paragraph of complaint will not be considered where the appellant's brief does not set out such paragraph, the demurrer, the memorandum, nor any statement of the record by which the court on appeal can tell what the contentions are, as required by the fifth clause of Rule 22.  
*Advisory Board, etc. v. State, ex rel., 331, 332 (1).*
13. *Statute.*—Section 3, Acts 1917 p. 523, is void so far as briefing is concerned.  
*Advisory Board, etc., v. State, ex rel., 331, 332, (2).*

## VII. REVIEW.

## (A) SCOPE AND EXTENT.

14. *Rulings on Evidence.—Review.*—Where the appellant's discussion of the rulings of the court relating to the evidence is general, the court on appeal is justified in so treating the rulings.  
*Public Service Commission v. Frazee, 573, 575 (1).*

## (B) PARTIES ENTITLED TO ALLEGE ERROR.

15. *Invited Error.*—An appellant who tendered instructions containing the same error as a given instruction of which he complains is in no position to avail himself of the error.  
*Jackson, Rec., v. Rutledge, 415, 426 (9).*
16. *Finding Against Appellee.—Absence of Cross-Errors.*—Where the finding was against the plaintiff appellee on the first paragraph of complaint, and no cross-errors are assigned, such paragraph need not be further considered on appeal.  
*Lawler v. Bear, 308, 310 (1).*
17. *Parties Entitled to Allege Error.*—Though a party that asked for a change of judge did not ask for a new trial, an appellant that excepted to the denial of the application for the change and assigned the denial as a cause for new trial, has a right to have reviewed such assignment, since the application of one coparty for a change of judge binds and directly affects all coparties.  
*Stidham v. Sterrett, 507, 509 (3).*

## (C) PRESUMPTIONS.

See also CRIMINAL LAW 99-102, 111; HIGHWAYS 6.

18. *Error in Denying Change of Judge.*—The duty to grant a proper motion for change of judge being imperative, the error in denying an application therefor, while not rendering void

## APPEAL—Continued.

- the subsequent proceedings, is of such vital importance that it is presumed to be harmful. *Stidham v. Sterrett*, 507, 509 (4).
19. *Striking out Motion for New Trial*.—Error of the trial court in striking from the record a proper motion for new trial will be presumed harmful in the absence of a showing to the contrary. *Phillips v. Gammon*, 497, 500 (5).
20. *Verdict*.—Where, in a personal injury action under the federal Employers' Liability Act, contributory negligence under the evidence was a question of fact for the jury, the court on appeal cannot assume that the jury found the plaintiff guilty of contributory negligence, in order to reduce the amount of the recovery, but, on the contrary, will indulge every presumption in favor of the verdict.  
*Jackson, Rec., v. Rutledge*, 415, 429 (14).

## (D) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

- See also LIBEL AND SLANDER 12, 13; MASTER AND SERVANT 6.
21. *Conflicting Evidence*.—The court on appeal will not weigh conflicting evidence. *Oilar v. Oilar*, 125, 128 (3).
22. *Weight of Evidence*.—In an action under the federal Employers' Liability Act, the contention that, since the injured plaintiff had the burden of proof on the issue whether the train on which he was employed was being operated in interstate commerce, he cannot recover where the evidence on each issue was evenly balanced, is of no avail on appeal, since the Supreme Court will not weigh the evidence.  
*Jackson, Rec., v. Rutledge*, 415, 423 (4).
23. *Weight of Evidence*.—The Supreme Court, when the evidence is conflicting, will consider only the evidence tending to support the verdict.  
*Lake Erie, etc., R. Co. v. McFarren*, 113, 116 (2).
24. *Weight of Evidence*.—On appeal from a judgment of the trial court annulling an order of the Public Service Commission, the Supreme Court will not weigh the evidence.  
*Public Service Commission v. Cleveland, etc., R. Co.*, 197, 203 (3).
25. *Sufficiency of Evidence*.—*Answers to Interrogatories*.—In determining whether the evidence is sufficient to support the verdict, answers to interrogatories will be accepted as establishing facts so found, unless there is a total want of evidence to sustain it. *Soubrier v. Brown*, 554, 565 (12).
26. *Question of Fact*.—*Jury Question*.—Where there was sufficient evidence to raise an issue of fact, the jury's finding thereon in favor of the appellee will not be disturbed on appeal. *Citizens' Bank, etc. v. Opperman*, 212, 222 (14).
27. *Erroneous Instructions*.—*Reversible Error*.—Where an examination of the evidence and interrogatories set out in a brief makes it clear that the verdict is right, instructions would have to be very erroneous to present reversible error.  
*Mishler v. Chicago, etc., R. Co.*, 189, 191 (3).
28. *Instruction*.—*Defective Complaint*.—*Failure to Demur*.—*Effect*.—*Statute*.—Since a verdict must be supported by all the facts essential under the law to sustain it, it is reversible error to instruct the jury that proof of the allegations of a complaint entitles the plaintiff to a verdict, where there is an omission to allege, directly or indirectly, a fact essential to the plaintiff's cause of action; and §344, cl. 6, Burns 1914.



## APPEAL—Continued.

Acts 1911 p. 415, requiring memoranda to be filed with demurrers and providing that defects not specified therein shall be deemed as waived, etc., was not intended to change this rule so as to permit a recovery without proof of facts essential to the cause of action, though such facts are not pleaded. (*Dunham v. Jones* [1915], 184 Ind. 46; *Cincinnati, etc., R. Co. v. Gross* [1917], 186 Ind. 471, overruled.)

*Prudential Ins. Co. v. Ritchey*, 157, 162, 164 (6).

- 29 *Reduction of Verdict*.—In an action for injuries, under the federal Employers' Liability Act, the court on appeal is without power to say that the verdict should have been reduced on account of contributory negligence, unless it can say that the plaintiff was guilty of contributory negligence as a matter of law.

*Jackson, Rec., v. Rutledge*, 415, 429 (13).

- 30 *Verdict*.—Where it appears from the record that a verdict is based on improper items of damages, the verdict will be held to be excessive, and a new trial will be granted; and the same rule applies where a verdict is based on an item of damage that has no evidence to sustain it.

*Indiana Pipe Line Co. v. Christensen*, 400, 414 (13).

## (E) HARMLESS ERROR.

See also CRIMINAL LAW 7, 26, 28, 58, 97; HOMICIDE 2; WILLS 2.

- 31 *Excluding Contradictory Statement*.—*Effect*.—Where, on cross-examination, a witness for the plaintiff identified a written statement as one signed by him previously to the trial, and did not deny a statement therein that was contradictory to his testimony, but in effect admitted it, the exclusion of such written statement was not harmful to the defendant.

*Jackson, Rec., v. Rutledge*, 415, 423 (5).

- 32 *Erroneous Instruction*.—*Negligence*.—*Due Care*.—In an action for wrongful death, an instruction which held the defendant railroad company to the "highest degree of care," etc., was erroneous, and the court on appeal cannot hold it as harmless where, in view of the evidence, the question of the defendant's negligence was so close that the jury might have been influenced by the erroneous instruction.

*Union Traction Co. v. Berry, Admr.*, 514, 525 (9).

- 33 *Erroneous Instruction*.—In a railway conductor's action for injuries, under the federal Employers' Liability Act, an instruction, though it improperly permitted the jury to decide as a fact whether the failure of certain employees to observe precautions prescribed by a rule of the company was negligence, was not prejudicial to the defendant where such instruction, in view of the evidence, was not more unfavorable than one would have been that stated the law correctly.

*Jackson, Rec., v. Rutledge*, 415, 426 (10).

- 34 *Erroneous Instructions*.—An instruction, in a personal injury case, which told the jury that, though intoxication of the plaintiff would not of itself prevent a recovery, but that evidence of intoxication has a bearing on the question whether he exercised the care and caution required of him as a "sober man," was not prejudicial, where the jury was asked whether the plaintiff was intoxicated and answered, "Not sure."

*Mishler v. Chicago, etc., R. Co.*, 189, 195 (8).

## APPEAL—Continued.

35. *Instructions.—Language.*—The verbal niceties and fine distinctions which analytical minds are able to make in the use of words are not to be invoked to hamper trial courts and to work reversals, when it is plain that a man of ordinary understanding would not be misled.  
*Mishler v. Chicago, etc., R. Co.*, 189, 195 (7).
36. *Misconduct of Counsel.—Cure of Error.*—In an action for injuries sustained by the plaintiff in a collision with the defendant's automobile, the misconduct of the plaintiff's counsel in offering to prove in the presence of the jury that the defendant carried indemnity insurance and that his counsel were employed by the insurance company, was not cured by an instruction that the defendant was not liable unless the car was being used in his business at the time of the accident.  
*Martin v. Lilly*, 139, 146 (8).
37. *Overruling Demurrer.*—Error in overruling a demurrer to a paragraph of complaint was harmless, where the plaintiff recovered judgment under another paragraph.  
*Luckett v. Hammond*, 484, 487 (2).
38. *Overruling Demurrer.*—Where the court specially instructed the jury to consider only the third and fourth paragraphs of the defendant's answer, there was no available error in overruling the plaintiff's demurrer to the second paragraph of answer.  
*Crouch & Son v. Parker*, 660, 663 (1).
39. *Overruling Demurrer.*—Where no judgment was rendered against the plaintiffs on the defendant's cross-complaint, the overruling of a demurrer to a paragraph thereof presents no available error.  
*Crouch & Son v. Parker*, 660, 670 (5).
40. *Right Result.*—Where a judgment is clearly right under the evidence, a question as to the exclusion of evidence, though the ruling thereon by the trial court were erroneous, will not be considered on appeal.  
*Van Natta v. Van Natta*, 75, 78 (5).
41. *Scope.—Sufficiency of Answer.*—Where a demurrer was sustained to a paragraph of answer of estoppel in a replevin action, but the defendant was permitted to prove all the facts alleged therein under the general denial, the Supreme Court will not determine the sufficiency of the answer, nor whether estoppel is provable under the general denial.  
*Citizens' Bank, etc. v. Opperman*, 212, 215 (3).
42. *Sustaining Demurrer.*—Generally it is harmless error to sustain a demurrer to one paragraph of complaint where the facts pleaded therein are provable under another; but this rule does not obtain where the paragraph held bad proceeds upon a different theory than such other paragraph.  
*Hill v. Chicago, etc., R. Co.*, 130, 138 (7).
43. *Sustaining Demurrer.*—To constitute reversible error, the sustaining of a demurrer to an answer of estoppel in a replevin action must have been harmful to the defendant by denying him opportunity to prove the matters alleged therein.  
*Citizens' Bank, etc. v. Opperman*, 212, 215 (2).
- (F) WAIVER OF ERROR.
44. *Briefs.*—Where the appellant makes no point, cites no authority, and presents no argument as to an assigned error, it will not be reviewed.  
*Citizens' Bank, etc. v. Opperman*, 212, 215 (1).

**APPEAL—Continued.**

45. *Overruling Demurrer.*—Where the appellant failed to set out in his brief a copy, or the substance, of a demurrer, or to amend the brief after the defect had been pointed out by the appellee, the alleged error in overruling a demurrer to the complaint is waived. *Lawler v. Bear*, 308, 311 (2).

**(G) SUBSEQUENT APPEALS.**

See also **HIGHWAYS 9.**

46. *Questions to be Decided.*—In a subsequent appeal, only those propositions are to be considered that are not foreclosed as the law of the case by the former opinion.

*Whitesell v. Metsker*, 1, 3 (1).

**APPROPRIATIONS—**

See **CEMETERIES; COLLEGES AND UNIVERSITIES**

**ARREST—**

Of judgment, motion, scope, see **CRIMINAL LAW 66, 67, 105; JUDGMENT 4; TRIAL 16.**

**ARSON—**

See also **INDICTMENT AND INFORMATION 1.**

1. *Character of Property.—Proof.*—Under an indictment for arson which alleges the burning of a building of another, the state should prove a burning of that which was a part of the structure belonging to the real estate, and not the defendant's personal property in the building, which he had a right to remove. *O'Daniel v. State*, 477, 479 (1).
2. *Evidence.—Motive.—Insurance.*—In a prosecution for burning the building of another, evidence concerning insurance which the defendant had on his personal property in the building was competent to show motive, though the statute defining arson makes it a crime to burn one's own property to defraud an insurance company, a different crime than that charged. *O'Daniel v. State*, 477, 480 (3).
3. *Proof.—Sufficiency of Agreement as to Ownership of Building.—Inference.*—In a prosecution for burning the building of another, under §2260 Burns 1914, Acts 1905 p. 584, §371, a judgment of conviction must be reversed, where the only evidence as to the ownership and the value of the building was an agreement by the parties in reference thereto which failed to fix any date of ownership, as the court on appeal will not infer the date to be that alleged in the indictment; the state, in asking for an admission from a defendant in a criminal case, should make its request as certain and accurate as the proof is required to be. *O'Daniel v. State*, 477, 479, 483 (2).
4. *Value of Structure.—Statute.—Construction.*—In the statute defining arson, §2260 Burns 1914, Acts 1905 p. 584, §371, the provision fixing the value of the property burned at "twenty dollars or upwards" has reference to the value of the thing burned and not to the damage caused by the burning. *O'Daniel v. State*, 477, 481 (4).

**ASSAULT AND BATTERY—**

See also **CARRIERS 5; HOMICIDE 1; INDICTMENT AND INFORMATION 2.**

**ASSAULT AND BATTERY—Continued.**

1. *Striking with Automobile.—Intent.*—An assault and battery may be committed by striking another with an automobile, where there is a criminal intent.

*Bleiweiss v. State*, 184, 185 (2).

2. *Striking with Automobile.—Intent.*—In a prosecution of a defendant for assault and battery for striking another with an automobile, the element of intent may not be implied from the lack of ordinary care, but it may be implied from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict the injury, or from the commission of an unlawful act that leads directly to the injury.

*Bleiweiss v. State*, 184, 185, 187 (3).

**ASSESSMENTS—**

See TAXATION 2, 6, 7.

Districts, legislative power, see MUNICIPAL CORPORATIONS 1.

Street improvements, see MUNICIPAL CORPORATIONS 7, 8.

**ASSIGNMENT OF ERRORS—**

See APPEAL 10.

**ASSIGNMENTS—**

Of assessments, rights of assignee, see MUNICIPAL CORPORATIONS 8, 13.

Of policy, complaint, sufficiency, see INSURANCE 1.

Parol, validity, see INSURANCE 4.

1. *What May be Assigned.*—Personal property and choses in action to be acquired in the future under a valid contract may be assigned, and such assignments, when fairly made for a valuable consideration, are recognized and enforced in equity.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 630 (3).

2. *What May be Assigned.*—A mere possibility is not the subject of assignment; the thing assigned must have an actual or a potential existence.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 630 (4).

3. *What May be Assigned.—Wages.*—If the thing on which an assignment is intended to operate is wages to be earned under an employment, or money to be realized by the performance of a contract, it is essential to the validity of the assignment that the contract be in actual existence at the time the assignment is made.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 630 (5).

4. *Operation.*—Where the subject of an equitable assignment is money to be earned in the future, either as wages or by the performance of a contract, such assignment does not become operative until some wages have been earned or something has become payable under the contract.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 630 (6).

**AUTOMOBILES—**

Reckless driving, injury, see ASSAULT AND BATTERY.

Use of, care, see HIGHWAYS 11, 12.

**BANKS AND BANKING—**

See also **EMBEZZLEMENT**.

1. *Indictment.—Charging Officer Having No Credit with Drawing Check.*—The statement in an indictment of a bank official for drawing and receiving a check in violation of §2295 Burns 1914, Acts 1905 p. 584, that the defendant "knew at the time that he had no funds to his credit" was sufficient to charge that the defendant had no funds to his credit therein and knew that he had none. *Hinshaw v. State*, 447, 452 (2).
2. *Indictment.—Overdraft by Banker.—Facts and Conclusions.*—In an indictment, under §2295 Burns 1914, Acts 1905 p. 584, allegations that on a certain date the accused was president and director of a certain incorporated bank, doing business in a named county of the state, and that he did then and there feloniously, unlawfully and knowingly overdraw his account in such bank, are not conclusions, but statements of the material facts necessary to constitute the offense defined in the first clause of such section. *Hinshaw v. State*, 447, 452 (1).
3. *Officer Drawing Check Without Credit.*—The offense defined in §2295, cl. 2, Burns 1914, Acts 1905 p. 584, was complete, if an officer of a bank having no funds to his credit therein indorsed a check payable to himself, presented it to another institution and from it received payment or credit thereon. *Hinshaw v. State*, 447, 461 (18).
4. *Official Drawing Check Without Credit.—Sufficiency of Evidence.—Criminal Law.*—In the prosecution of a bank official for drawing and receiving payment of a check in violation of §2295, cl. 2, Burns 1914, Acts 1905 p. 584, the state, in order to convict, must prove that the defendant had no funds to his credit in the bank at the time of drawing and receiving payment on the check, and evidence failing to show when the check was drawn, or that at the time of receiving payment thereon the defendant had no funds to his credit in the bank, is insufficient to sustain a conviction. *Hinshaw v. State*, 447, 462 (19).

**BELIEF—**

As element of defense, see **CRIMINAL LAW 3**.

**BENEFICIARIES—**

Rights under "facility payment clause," see **INSURANCE 3**.

**BENEFITS—**

See **DRAINS 6**; **HIGHWAYS 3**; **INSURANCE 2**; **TAXATION 1**; **TRIAL 3**.

**BIAS—**

See **JUDGES**.

**BONDS—**

Stay of proceedings, see **APPEAL 4**.

Construction, sewers, liability, see **MUNICIPAL CORPORATIONS 20**.

**BRIBERY—**

See also **CONSPIRACY 4, 10, 14**; **CRIMINAL LAW 9, 10, 24**; **INDICTMENT AND INFORMATION 7-10, 22**.

"*Bribe.*"—*Definition.*—A bribe is any gift, advantage, or emolument offered, given, or promised to, or asked or accepted by, any public officer to influence his behavior in office.

*Williams v State*, 283, 296 (11).

**BRIDGES—**

1. *Action for Damages.—Liability of Contractor.—Acceptance by County.*—Where a county bridge, constructed by a contractor, under Acts 1899 p. 170, §5590 *et seq.* Burns 1901, was defective and, after its acceptance by the county and about five years after its construction, gave way, causing the death of the plaintiff's husband, the contractor was not liable, in the absence of a showing that its acceptance was procured through fraud or deception of the contractor, since by the acceptance the chain of causation between the contractor's negligence and the injury was broken.

*Travis, Admx., v. Rochester Bridge Co., 79, 82 (2).*

2. *Construction.—Breach of Duty.—Contractors.—Liability.*—In the construction of bridges by the county, the primary duty to make them safe for public use is upon the county, and this primary obligation is not divested, as between it and independent contractors, by the fact that the legislature has not imposed a liability on counties for the breach thereof.

*Travis, Admx., v. Rochester Bridge Co., 79, 82 (1).*

**BOUNDARIES—**

See **WATERS AND WATERCOURSES.**

**BRIEFS—**

See **APPEAL 11-13.**

**BROKERS—**

1. *Real Estate.—Commissions.—Statute.—Construction.*—Section 7463 Burns 1914, Acts 1913 p. 638, applies to all contracts by which one person agrees to find or procure a purchaser for the real estate of another in consideration of a commission or reward; and this is true even though the result is to be accomplished in conjunction with, or through the efforts of, other agents.

*Bryan v. State, 548, 552 (2).*

2. *Sale of Realty.—Parol Contract for Commissions.*—An alleged parol contract employing the defendant to sell real estate for the plaintiff, by the terms of which the defendant was to receive \$25,000, in addition to his salary, when \$100,000 worth had been sold, was within the statute requiring contracts for the sale of realty to be in writing (§7463 Burns 1914, Acts 1913 p. 638), even though such sum was to be paid the plaintiff for managing the defendant's sales force.

*Bryan v. State, 548, 551 (1).*

**BUILDINGS—**

See **ARSON.**

**BULK SALES—**

See **FRAUDULENT CONVEYANCES.**

**BYSTANDERS—**

Calling, for grand jury service, effect, see **GRAND JURY 2.**

**CARE—**

See **APPEAL 32; CARRIERS 2; MASTER AND SERVANT 4; NEGLIGENCE 5-8; RAILROADS 4.**

## CARRIERS—

See also NEGLIGENCE 1, 3, 4, 6-8, 13-15.

1. *Existence of Relation of Passenger.—Instruction.*—In an action for injuries, where the complaint alleged that the plaintiff boarded the defendant's car at a regular stopping place, that the car was so crowded that he could not obtain a seat, and that the jolting and swaying of the car, due to rough and uneven tracks, threw him from the platform, an instruction as to whether the plaintiff could become a passenger if he boarded the car, or attempted to do so, while it was in motion and without the knowledge or consent of the defendant or its agents, was proper, in view of the jury's special verdict showing that only six persons were on the car, none of whom was on the platforms or in the aisles, and the plaintiff attempted to board the car at a place that was not a regular stopping place, and while it was in motion, and that he missed his footing and fell to his injury.

*Mishler v. Chicago, etc., R. Co.*, 189, 193 (4).

2. *Ordinary Care.—Res Ipsa Loquitur.*—The rule holding carriers, for the protection of passengers, to the degree of care that a person of ordinary prudence would regard as necessary under the particular circumstances does not abrogate the rule of *res ipsa loquitur* as applied in cases involving injuries to passengers, since the latter rule does not depend on the standard of care imposed, but on the nature of the occurrence out of which the injury arises, and may be applied under the rule holding the carrier to ordinary care.

*Union Traction Co. v. Berry, Admr.*, 514, 530 (10).

3. *Passenger's Intent to Make Continuous Journey.—Evidence.*—An arrangement made by a passenger by telephone with the carrier's agent at an intermediate point, before entering the car at the initial point, for the purchase of a ticket for carriage from the intermediate point to destination, indicates a determination to make a continuous journey on the same car, notwithstanding his statement that he intended to leave the car at the intermediate point to get the ticket.

*Arbuckle v. State*, 444, 446 (2).

4. *Rate Schedule for Continuous Journey.—Validity.*—A provision in a rate schedule prohibiting a passenger from choosing a combination of fares between intervening points instead of the through rate, upon its approval by the Public Service Commission, became binding upon the carrier and its passengers, and justified a conductor in demanding of a passenger, upon the same train, who had paid his way to an intermediate point and presented a ticket for carriage from there to destination, the additional amount necessary to make up the through fare as scheduled.

*Arbuckle v. State*, 444, 445 (1).

5. *Removal of Passenger.—When Justified.—Assault and Battery.*—Where a passenger paid his fare to an intermediate point of an intended continuous journey and presented a ticket for the remaining distance and refused to pay an additional sum to make up the through fare required by a schedule approved by the Public Service Commission, which schedule prohibited the choosing of a combination of fares between intervening points, the conductor was justified in ejecting the passenger, upon his refusal to voluntarily leave the car.

*Arbuckle v. State*, 444, 447 (3).

**CARRIERS—Continued.**

6. *Damages to Freight.—Failure to Allow or Reject Claim.—Complaint.*—In an action against a carrier, under Acts 1911 p. 454, §§3920b-3920h Burns 1914, for failure to pay or reject, in whole or in part, a claim for damages within the time provided in the statute, it is not essential to allege the failure of the carrier to take steps for the preservation of the goods shipped or to give notice, etc., as required in a common-law action for damages to shipments.

*Clift v. Southern R. Co.*, 472, 476 (3).

7. *Failure to Allow or Reject Claim for Damages.—Action.—Complaint.*—In an action, under Acts 1911 p. 454, §§3320b-3320h Burns 1914, for failure of the carrier to pay or to reject within ninety days a claim for damages to a shipment of water-melons belonging to the plaintiff, a complaint showing that the carrier received the shipment in good condition from the plaintiff's agents to be delivered to the consignee upon presentation of a bill of lading, that the carrier never surrendered the bill of lading but wrongfully allowed the consignee to remove a part of the melons and failed to notify the plaintiff of the consignee's refusal to accept the rest until after they had spoiled, and that the claim was filed within four months, was sufficient to bring the plaintiff within the provisions of the statute and to show that the claim was not fictitious.

*Clift v. Southern R. Co.*, 472, 474, 476 (2).

8. *Rejection or Allowance of Freight Claims.—Statute.—Validity.*—The act of 1911 (Acts 1911 p. 454, §§3920b-3920h Burns 1914), providing for an action in damages, where the carrier neither pays nor rejects within ninety days a claim for freight lost or damaged, so far at least as the initial carrier is concerned, is not in conflict with the federal or the state Constitution.

*Clift v. Southern R. Co.*, 472, 473 (1).

9. *Filing Schedule of Rates.—Effect.*—Where the Railroad Commission, prior to the passage of Acts 1907 p. 454, §5533 *et seq.* Burns 1914, and after a hearing, made an order fixing rates for shipments of certain classes of freight over a division of a carrier's lines, the rates thereafter fixed in a schedule and filed by the carrier in accordance with such act do not govern, the carrier being bound by the commission's order.

*Vandalia R. Co. v. Schnull*, 87, 101 (16).

10. *Order of Railroad Commission.—Statute.—Retroactive Effect.*—Section 7 of the act of 1907 (Acts 1907 p. 454, amending Acts 1905 p. 83) did not limit the life of an order of the Railroad Commission fixing rates entered in 1906, under the act of 1905, since the amending act of 1907 was not retroactive.

*Vandalia R. Co. v. Schnull*, 87, 92 (7).

11. *Rates.—Statutes.—Reasonableness.—Presumption.*—Legislation fixing rates is presumed to be reasonable, and this presumption prevails until all the facts showing the contrary appear, although no hearing was had before its passage, and a much stronger presumption obtains in favor of an order of the Railroad Commission, under Acts 1905 p. 83, after a trial between the parties actually interested; hence a showing by a carrier that rates over a part of its line for transporting particular classes are not remunerative is not sufficient, the burden being upon the carrier to exclude other facts bearing on the question.

*Vandalia R. Co. v. Schnull*, 87, 100 (14).



## CARRIERS—Continued.

12. *Rates.—Orders.—Vacation.—Statute.—Construction.*—An order of the Railroad Commission, under Acts 1905 p. 83, fixing rates, did not exhaust the commission's powers and, though affirmed on appeal, the commission could have made a new order in the interest of changing needs of the public welfare, unless prevented by the act; hence an order so affirmed did not become perpetual, so as to warrant a construction of the amending act, Acts 1907 p. 454, §5433 *et seq.* Burns 1914, which limited the life of existing orders, as being remedial and retro-active.  
*Vandalia R. Co. v. Schnull*, 87, 93 (11).
13. *Rates.—Order of Railroad Commission.—Enforcement.*—That the Railroad Commission is empowered, under Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, to enforce its orders imports neither expressly nor by implication that the parties to a proceeding by shippers, involving reasonableness of rates, may not use an order fixing rates as an element of evidence in an effort to enforce existing rights at common law.  
*Vandalia R. Co. v. Schnull*, 87, 91, 92 (5).
14. *Rates.—Reasonableness.*—If a carrier receives in the aggregate a fair remuneration, notwithstanding the rates on part of its business are not remunerative, it has no basis for complaint; hence a hearing involving fairness of rates on a part of its line is not properly confined to particular rates and actual cost in carrying the classes specified on such part of the line.  
*Vandalia R. Co. v. Schnull*, 87, 96, 99 (13).
15. *Rates.—Reasonableness.*—A carrier is entitled to fair remuneration on all its investments and property, and for this it undertakes to reasonably serve in the capacity chosen by it.  
*Vandalia R. Co. v. Schnull*, 87, 96 (12).
16. *Regulation of Rates.—Police Power.*—Orders of the state, through the Railroad Commission, regulating the rates of carriers are an exercise of the state's public welfare power.  
*Vandalia R. Co. v. Schnull*, 87, 93 (9).
17. *Regulation of Rates.—Constitutional Provisions.*—The state is restrained by the Constitution from arbitrary action by the legislature or by agency of the Railroad Commission in fixing rates charged by carriers; but there is a wide field of discretion in the legislature or the commission.  
*Vandalia R. Co. v. Schnull*, 87, 101 (15).
18. *Rights of Shippers.—Regulations.—Statute.*—The act creating the Railroad Commission, Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, does not create a new right of shippers to reasonable service and reasonable rates, but only a new remedy for an existing right.  
*Vandalia R. Co. v. Schnull*, 87, 91 (3).
19. *Rights of Shippers.—Common Law.*—At common law shippers were entitled to reasonable service and reasonable rates, which rights were enforceable at law and in equity.  
*Vandalia R. Co. v. Schnull*, 87, 90 (2).
20. *Rights of Shippers.—Remedies.—Statute.*—The act creating the Railroad Commission and empowering it to enforce its orders, Acts 1905 p. 83, as amended by Acts 1907 p. 454, §5533 *et seq.* Burns 1914, does not prevent the enforcement by shippers of rights at common law or in equity, since the remedies provided in the act are cumulative and not exclusive.  
*Vandalia R. Co. v. Schnull*, 87, 91, 92 (6).

**CARRIERS—Continued.**

21. *Through Routes and Joint Rates.—Rights of Public.—Evidence.*—Where the evidence tended to show that a private company would be the principal, if not the sole, beneficiary of joint rates, between a short freight line and a through railroad, which were sought in a petition before the Public Service Commission, the trial court was justified, on appeal from an order granting joint rates, in annulling the order of the commission on the grounds that it was not required for the benefit of the shippers and receivers of freight.

*Public Service Commission v. Cleveland, etc., R. Co.*, 197, 203 (4).

22. *Duty to Prospective Passenger.—Boarding Moving Car.*—The defendant street car company owed the plaintiff no duty as to the smoothness of its tracks over a railroad crossing while he was attempting to board a moving car, the crossing being a point where ordinary prudence would dictate that the car should be kept moving.

*Mishler v. Chicago, etc., R. Co.*, 189, 197 (5).

**CASES—**

Reported, p. iii; cited, p. vi.

Disapproved, see CRIMINAL LAW 37; NEGLIGENCE 8.

Distinguished, see CRIMINAL LAW 44, 68; PUBLIC LANDS.

Explained, see CONSTITUTIONAL LAW 10.

Overruled, see APPEAL 28; PUBLIC LANDS.

**CEMETERIES—**

See also DEDICATION.

- Public.—Care and Maintenance by Township.*—Where land was deeded to a township for a public cemetery, and the deed was duly accepted, and the township has sufficient funds to pay for its maintenance without violating any limitation upon its power to incur debt, the advisory board may be compelled, under §§4438, 4438a Burns 1914, Acts 1913 p. 290, to appropriate, and the trustee to expend, funds for the maintenance thereof, under a showing that the trustee, having no appropriation for the purpose, refuses to ask the advisory board therefor, and the advisory board refuses to make any appropriation for the purpose.

*Sell, Trustee, v. State, ex rel.*, 671, 674 (4).

**CHARACTER—**

See CRIMINAL LAW 57.

Of codefendants, evidence, see CRIMINAL LAW 31.

**CHASTITY—**

Want of, evidence, admissibility, see RAPE 2.

**CHECKS—**

Drawing of, by bank official without credit, see BANKS AND BANKING.

**CITIES—**

See MUNICIPAL CORPORATIONS.

**CLASSIFICATION—**

Legislative power, see CONSTITUTIONAL LAW 1, 2.

## COCONSPIRATORS—

Declarations, admissibility, see CRIMINAL LAW 30.

## CODICIL—

See WILLS.

## COLLATERAL ATTACK—

See JUDGMENT 2.

## COLLEGES AND UNIVERSITIES—

1. *Appropriations.—Statute.—Construction.*—The appropriations for the departments of agricultural extension and experiment work in pursuance of federal acts are sufficiently permanent to be within §4 of the saving clause of the Mill Tax Act (Acts 1913 p. 505), and are therefore exempt from the provisions of the act limiting appropriations to the university.

*Indiana State Board of Finance v. State, ex rel., 36, 53 (9).*

2. *Appropriations.—Statute.—Construction.*—The federal appropriations for the agricultural experiment and extension departments of Purdue University may be terminated by the act of the state, and this fact warrants a construction of the saving clause in §4 of the Mill Tax Act (Acts 1913 p. 505) as applying to such appropriations, but not necessarily to the state appropriations.

*Indiana State Board of Finance v. State, ex rel., 36, 51, 53 (8).*

3. *Appropriations.—Statute.—Construction.*—That §4 of the Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, was to cut off appropriations for buildings and other special purposes, but not the previously established appropriations for the departments of agricultural extension and experiment work, is indicated by the fact that the legislature granted the university an appropriation greatly in excess of the amount demanded and provided that any surplus should not revert to the state but should be used for new buildings, a request for specific appropriations for new buildings having been denied.

*Indiana State Board of Finance v. State, ex rel., 36, 50 (7).*

4. *Appropriations.—Statute.—Construction.*—The mention in the Mill Tax Act of 1913 (Acts 1913 p. 505) of the departments of Indiana University and the omission to mention the different departments of Purdue University indicate that the agricultural extension and experiment station departments of the latter were excluded from the use and benefit of the mill tax.

*Indiana State Board of Finance v. State, ex rel., 36, 49 (6).*

5. *Appropriations.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue, does not affect the appropriations to the Agricultural Experiment Station provided in the Hog Cholera Act (Acts 1913 p. 333) and in the act relative to inspection of creameries (Acts 1913 p. 920, §6866a Burns 1914), this construction being manifest from the fact that the latter became effective on its passage—five days after the approval of the Mill Tax Act—and neither was payable to the university proper.

*Indiana State Board of Finance v. State, ex rel., 36, 47, 49 (5).*

6. *Appropriations.—Statute.—Construction.*—In limiting appropriations to Purdue University by the Mill Tax Act (Acts 1913 p. 505), the legislature did not intend to exclude appropriations

## COLLEGES AND UNIVERSITIES—Continued.

made in earlier acts to the departments of agricultural extension and experiment work, since the legislature, at the same session, created other such departments, and made appropriations therefor to operate in the future, notwithstanding the limitations in the tax act.

*Indiana State Board of Finance v. State, ex rel.*, 36, 46 (4).

7. *Appropriations.—Agricultural Experiment Station.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, does not prevent the payment to the university of the appropriation of \$75,000 for the Agricultural Experiment Station provided in Acts 1909 p. 403, since the act makes the university only a trustee for the experiment station, which was originally provided for by act of Congress of March 2, 1881 (§8878 *et seq.* U. S. Comp. St. 1916), appropriating funds to the state for such purpose.

*Indiana State Board of Finance v. State, ex rel.*, 36, 44, 46 (3).

8. *Appropriations.—Statute.—Construction.*—Though the Mill Tax Act (Acts 1913 p. 505), which limited appropriations to Purdue University, provided a larger increase for the university than the officials asked for, the act did not terminate the appropriation for agricultural extension work provided in the act of 1911 (Acts 1911 p. 80), otherwise there would be no amount fixed for such work and the bureau, continued by law in charge thereof, would have no fund except at the discretion of the university trustees, who, under the law, constitute only a part of the governing body of the extension department, and their powers were not increased by the tax act.

*Indiana State Board of Finance v. State, ex rel.*, 36, 43 (2).

9. *Appropriations.—Statute.—Construction.*—The Mill Tax Act (Acts 1913 p. 505), limiting appropriations to Purdue University, did not repeal the act of 1913 appropriating to the university \$30,000 for greenhouse, \$28,000 for a new dairy building, and \$125,000 for the purchase of additional farm land for the agricultural department, since such sums under the tax act would not have become available until the year following, and there was immediate need therefor.

*Indiana State Board of Finance v. State, ex rel.*, 36, 53 (10).

10. *Appropriations.—Purdue.—Agricultural Extension.*—The act of 1911 (Acts 1911 p. 80), appropriating \$30,000 to Purdue University for agricultural work, like the similar acts of 1889, 1901 and 1907 that it repealed, was not passed for the maintenance of the university proper, but only constituted its officials as part of the body having charge of the expenditure of said sum in the interest of agricultural experiment work, etc.—a purpose independent as to funds and as to the extent of the work; hence, such appropriation was not terminated by the Mill Tax Act (Acts 1913 p. 505), which limited appropriations to the university to a specified amount.

*Indiana State Board of Finance v. State, ex rel.*, 36, 40, 42, 43 (1).

## COMMISSIONERS—

Highway, power, qualification, see HIGHWAYS 4, 5, 9.

County, disqualification, when compelled to act, see HIGHWAYS 9.

## COMMISSIONS—

See BROKERS.

**COMMON LAW—**

See CARRIERS 19; CRIMINAL LAW 2.

Action, forms, see ACTION 1.

Indictment for conspiracy, see CONSPIRACY 7.

**COMPENSATION—**

See EMINENT DOMAIN.

**COMPLAINT—**

See PLEADING.

**CONCLUSIONS—**

See BANKS AND BANKING 2; CRIMINAL LAW 26; EVIDENCE 5; INDICTMENT AND INFORMATION 25; PLEADING 4; TRIAL 4, 5.

**CONSPIRACY—**

See also INDICTMENT AND INFORMATION 6-10; RECEIVING STOLEN GOODS 1.

1. *Acts of Coconspirators.—Joining Existing Conspiracy.*—One who connects himself with an existing conspiracy and joins in carrying out the common purpose and design will be deemed in law a party to every act which had before been done by the others and which may afterwards be done by any of the others in furtherance of the design.  
*Roberts v. State*, 713, 718 (7).
2. *Existence of.—Joining Conspiracy.—Jury Questions.*—Whether certain defendants entered into a common purpose or design to commit, or to procure to be committed, the crime charged, and whether another connected himself with such common purpose, were questions of fact for the jury.  
*Roberts v. State*, 713, 721 (9).
3. *Existence and Nature.*—The existence or nature of a conspiracy cannot be established by the acts or declarations of one conspirator in the absence of the others, unless the acts or declarations were in themselves in execution, or for the promotion, of the common design.  
*Roberts v. State*, 713, 721 (8).
4. *Indictment.—Solicitation of Bribes.—Overt Acts.*—An indictment for conspiracy to solicit bribes in violation of §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, need not show overt acts done in pursuance of the conspiracy.  
*Williams v. State*, 283, 293 (5).
5. *Indictment.—Sufficiency.*—An indictment for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, to be good as against a motion to quash, must not only state facts showing the conspiracy, but must also charge the felony with the same particularity as though the accused were to be tried for the felony alone.  
*Williams v. State*, 283, 288 (1).
6. *Indictment.—Sufficiency.—Charging Civilly Unlawful Act.*—In a prosecution for conspiracy, an indictment charging, as the object of the conspiracy, the commission of a civilly unlawful act, though such act is closely and logically related to another that is criminal, is insufficient under §2647 Burns 1914, Acts 1905 p. 584, §641, defining conspiracy as the uniting or the combining of persons, etc., to commit a felony.  
*Hinshaw v. State*, 147, 151 (4).

## CONSPIRACY—Continued.

7. *Indictment at Common Law.*—At common law, a conspiracy to do an unlawful act, or to do a lawful act by criminal means, was indictable.  
*Hinshaw v. State*, 147, 152 (6).
8. *Indictment.—Sufficiency.—Inference.*—The gist of a criminal offense must be stated in direct and positive terms; hence, in a prosecution for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, an indictment containing words that show the object of the conspiracy to be nothing more than the civilly unlawful act of fraud, though such words could be used to state the gist of the purposed offense as that of false pretense, cannot be held sufficient as charging the purposed offense substantially in the language of the statute.  
*Hinshaw v. State*, 147, 152 (5).
9. *To Commit Felony.—Indictment.*—Under §2647 Burns 1914, Acts 1905 p. 584, §641, an indictment for conspiracy to commit a felony must charge the purposed felony as specifically as though the defendant were on trial for that felony.  
*Hinshaw v. State*, 147, 150 (2).
10. *To Commit Felony.—Bribery.—Indictment.—Sufficiency.—Failure to State Names of Persons to be Solicited.*—An indictment of a deputy prosecuting attorney and other officers under §2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, charging that many persons were engaged in operating gambling places, etc., in violation of law and that the defendants "did then and there feloniously and knowingly unite, combine, conspire and confederate together" to solicit bribes from persons engaged in such unlawful businesses or who might thereafter be so engaged, was sufficient as a charge of the crime under the statute, although it did not allege that the conspirators knew of specific violations or that they knew the names of persons actually engaged in such businesses, since the conspiracy sought to be charged was the combination of two or more persons by some concerted action to accomplish an act or purpose defined by statute as a felony, and the crime was complete when the unlawful confederation was formed to do the acts charged.  
*Williams v. State*, 283, 292 (3).
11. *To Defraud.—Indictment.—False Pretenses.*—In a prosecution for conspiracy, the allegation that the defendants "did \* \* \* conspire \* \* \* designedly with the intent to cheat and defraud \* \* \* by inducing and procuring \* \* \* by then and there feloniously, knowingly, designedly and falsely pretending, representing and giving out" was insufficient to charge a conspiracy to commit the crime of false pretense, under §2647 Burns 1914, Acts 1905 p. 584, §641, since "cheating" and "defrauding" are broader terms than "false pretense," and include not only the crimes of false pretense but also all civil frauds.  
*Hinshaw v. State*, 147, 151 (3).
12. *To Embezzle.—Indictment.*—An indictment of defendants, who were officers of a bank, for conspiracy, under §2647 Burns 1914, Acts 1905 p. 584, §641, to commit the crime known as bankers' embezzlement as defined by §2294 Burns 1914, Acts 1907 p. 14, was insufficient, where it failed to state that deposits, alleged to have been feloniously and fraudulently taken and received by the defendants, were so taken and received in their capacity as officers of the insolvent bank.  
*Hinshaw v. State*, 147, 156 (9).

## CONSPIRACY—Continued.

13. *Merger in Crime Committed*.—Where an indictment charges a conspiracy and also an overt act which in itself is criminal, the conspiracy is not merged in the higher offense, in case the defendant is placed on trial upon the charge of conspiracy only.  
*Williams v. State*, 283, 296 (12).
14. *Soliciting Bribes.—Ownership of Money.—Indictment*.—An indictment of a deputy prosecuting attorney and other officials for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, need not directly allege that the money, etc., was the property of the persons to be solicited, in view of the well-defined meaning of the word "bribe."  
*Williams v. State*, 283, 295 (10).

## CONSTITUTIONAL LAW—

See also EMINENT DOMAIN; STATUTES.

1. *Classification.—Legislative Power*.—The legislature has power to make a reasonable classification of persons for purposes of legislation, and to determine in the first instance what classification is just and reasonable in view of the purposes of the legislation; and the classification by the legislature will be sustained by the court, unless it is so manifestly arbitrary that reasonable minds could not differ on the subject.  
*Sperry & Hutchinson Co. v. State*, 173, 181, 182 (6).
2. *Classification.—License.—Validity.—Trading Stamps*.—The classification in chapter 184, Acts 1915 p. 674, providing for the licensing of only such corporations as are organized for the purpose of redeeming trading stamps, etc., in cash or in merchandise not the product of its own manufacture, and applying in like manner to individuals so engaged, but not applying to other corporations or persons, is so arbitrary and unreasonable as to render the act void under the fourteenth amendment to the federal Constitution and under Art. 1, §23, of the state Constitution, since the public morals and the public welfare, in the interest of which such a classification must be made, would be no more injuriously affected by the business conducted by one class than by that of the other.  
*Sperry & Hutchinson Co. v. State*, 173, 181 (7).
3. *Due Process.—State Statute*.—A state law that would have the effect by its enforcement of depriving a citizen of his property without due process of law would be void as violative of the fourteenth amendment of the federal Constitution, since such amendment is prohibitive on the several states in respect to the rights of citizens therein guaranteed.  
*Wright v. House*, 247, 252 (2).
4. *Due Process.—Regulation of Trading Stamps*.—Legislation regulating, and requiring a license for, the handling of trading stamps is not such an interference with the rights of citizens to pursue a legitimate business or a lawful calling as to be a denial of due process of law within the meaning of §1 of the fourteenth amendment to the federal Constitution.  
*Sperry & Hutchinson Co. v. State*, 173, 178 (2).
5. *Eminent Domain.—Due Process.—Compensation*.—The fifth amendment to the federal Constitution applies only to the federal government; hence, a state statute cannot be held invalid on the ground that it conflicts with such amendment.  
*Wright v. House*, 247, 252 (1).

CONSTITUTIONAL LAW—Continued.

6. *Indictments.—Sufficiency.—Rights of Accused.*—The words "nature and cause of the accusation" as used in Art. 1, §13, of the Constitution, relative to the rights of one accused of crime, mean that the gist of the offense shall be charged in direct and unmistakable terms. *Hinshaw v. State*, 147, 154 (8).
7. *Judicial Power.—Legislative Power.—Taxation.*—If the exercise of the taxing power in any instance is regarded by the people as unwise, unjust or oppressive, the remedy must be sought through legislative action, the judicial department being powerless to grant relief on such grounds.  
*Wright v. House*, 247, 257 (11).
8. *Legislative Power.*—Where doubt exists as to whether a business is subject to regulation under the police power, the determination of the question is within the province of the legislature; and the judgment of the court should be substituted for that of the legislature only where the legislation is purely arbitrary and without reason.  
*Sperry & Hutchinson Co. v. State*, 173, 179 (3).
9. *Legislative Power.—Federal Constitution.—Construction.*—The federal Constitution confers on Congress certain legislative power, and all such power not thus conferred is reserved to the several states. *Wright v. House*, 247, 260 (19).
10. *Legislative Power.—State Constitution.—Construction.*—The state Constitution carries a general grant of legislative power under which the legislature may enact any law on any subject, unless the power is limited or denied by other express provisions; the cases of *Ellingham v. Dye* (1912), 178 Ind. 336, and *Bennett v. Jackson* (1917), 186 Ind. 533, which seem to recognize a residue of power abiding in the people, must be confined in their scope to legislation that would deny, limit or impair the inherent and indefeasible right of the people to alter their government by the adoption of a new constitution.  
*Wright v. House*, 247, 259, 260, 261 (18).
11. *Legislative Power.—Encroachment on Judiciary.—Rules of Court.*—The Supreme Court has power to make its own rules as to briefs and as to the conduct of business before the court, and §3, Acts 1917 p. 523, in so far as it refers to rules relative to the sufficiency of briefs and the pointing out of defects therein, is void.  
*Solimeto v. State*, 170, 171 (2).
12. *Necessity for Judicial Action.*—The Supreme Court will not pass on constitutional questions that are hypothetical, nor determine the validity of a legislative act when such determination is not necessary to dispose of the cause.  
*Poer, Trustee, v. State, ex rel.*, 55, 60 (3).
13. *Police Power.—Statutes.*—The state never separates itself from the exercise of its public welfare power unless by clear expression of intention to do so.  
*Vandalia R. Co. v. Schnull*, 87, 93 (10).
14. *Police Power.—Trading Stamps.*—The practice of furnishing, using and redeeming trading stamps is subject to regulation and license under the police power of a state.  
*Sperry & Hutchinson Co. v. State*, 173, 177 (1).
15. *Park Improvements.—Statute.—Privileges and Immunities.*—The act of 1911 relative to the department of public parks in cities of the first and second classes, Acts 1911 p. 231, §8748 *et seq.* Burns 1914, under which an assessment district was



## CONSTITUTIONAL LAW—Continued.

formed to pay the cost of a boulevard improvement by the city of Indianapolis, including property outside the city limits, is not unconstitutional on the ground that it grants privileges or immunities to the citizens of such city which on the same terms do not belong equally to the owners of assessed property outside the city. *City of Indianapolis v. Bryan*, 586, 591 (7).

16. *Statutes.—Validity.—Presumption.*—An act of the legislature which has not been judicially declared unconstitutional or invalid is presumed to be a valid law.

*Felker v. Caldwell*, 364, 367 (2).

17. *State Highway Commission.—Judicial Power.*—The State Highway Act (Acts 1917 p. 253), which creates a highway commission, is not open to the objection that it confers powers of a judicial nature upon a body that is administrative in its character.

*Wright v. House*, 247, 262 (21).

18. *Validity of Act.—Appeal.—Objection.*—The objection that an act invades "the reserved power of the people" is indefinite, and unless the provision of the Constitution containing such reservation is pointed out, the Supreme Court will assume that the term is used with reference to some supposed governmental power that the people impliedly reserved unto themselves when the Constitution was adopted. *Wright v. House*, 247, 259 (17).

## CONSTRUCTION—

Of statutes, see CONSTITUTIONAL LAW; STATUTES.

Of wills, see WILLS.

## CONTEMPT—

1. *Indirect.—What Constitutes.*—Under §1044 Burns 1914, §1009 R. S. 1881, the publication of an unjustifiable criticism of a court, even though inaccurate or false and prompted by malicious motives, does not constitute contempt, where the matter had been fully disposed of before the criticism was published.

*Zuver v. State*, 60, 62 (1).

2. *Purging of, by Answer.*—When one undertakes to purge himself by a verified answer in a proceeding for indirect contempt, the facts alleged must be treated as true, and, if the facts so alleged under oath are sufficient to show that no contempt was committed, the defendant must be discharged, although he may be prosecuted for perjury if the answer is false.

*Zuver v. State*, 60, 63 (2).

## CONTINUANCE—

See CRIMINAL LAW 42-48, 86.

## CONTRACTORS—

See BRIDGES; CONTRACTS 3; MUNICIPAL CORPORATIONS 6-10, 12-18.

## CONTRACTS—

See also ASSIGNMENTS; BROKERS; DEEDS; DRAINS 7; FRAUD 1-4; MUNICIPAL CORPORATIONS 8-10; NAMES; PRINCIPAL AND SURETY.

1. *In Violation of Statute.—Recovery.*—There can be no recovery on a contract made in violation of a statute as between the parties thereto, the violation of which is prohibited by a penalty.

*Horning v. McGill*, 332, 334 (1).

## CONTRACTS—Continued.

2. *Performance.—Defenses.—Act of God.*—Where an obligation is imposed by law, a failure of performance thereof that is due to an act of God will be excused; but where a party by contract creates an absolute and unconditional obligation, the performance of which rests on himself, he is bound to perform or to answer in damages, notwithstanding any act of God or inevitable accident, because he might have provided against such contingencies.  
*Prather v. Latshaw*, 204, 210 (2).
3. *Performance.—Defenses.—Act of God.*—An unprecedented flood that did not render impossible the performance of a contract for the construction of a ditch and levee, though it damaged the work already done, did not excuse the contractor from the completion of the contract.  
*Prather v. Latshaw*, 204, 209 (1).
4. *Sale and Warranty.*—A contract for the sale of a chattel and a warranty thereof which are executed at the same time constitute one contract. *Crouch & Son v. Parker*, 660, 663, 666 (2).

## CONTRIBUTORY NEGLIGENCE—

See MASTER AND SERVANT 4-7; NEGLIGENCE 2, 3, 15.

## COUNSEL—

Absence, continuance, see CRIMINAL LAW 42.

Misconduct, see APPEAL 36.

## COURTS—

See also APPEAL; CONTEMPT; JUDGES.

Rules, power to make, see CONSTITUTIONAL LAW 11.

1. *Decisions.—Federal Supreme Court.—Effect on State Courts.*—A decision of the federal Supreme Court sustaining the validity of a state statute, though not binding on the state courts, where the statute is attacked as being in conflict with a similar provision in a state constitution, is strongly persuasive as authority and is generally followed.  
*Sperry & Hutchinson Co. v. State*, 173, 179 (5).
2. *Discretion.—Appointment of Special Prosecutor.*—Though no statute expressly authorizes the appointment of a special prosecuting attorney to appear before the grand jury, or to assist the prosecuting attorney in the trial of criminal cases, the courts having general jurisdiction of criminal matters has the inherent power in their discretion to appoint an attorney to assist the prosecuting attorneys in the trial of criminal cases.  
*Williams v. State*, 283, 301 (19).
3. *Jurisdiction.—Constitutional Questions.*—The Supreme Court has jurisdiction of an appeal challenging the validity of a statute as being in conflict with the federal and state Constitutions.  
*Kilgore v. Templer*, 675, 682 (4).
4. *Construction of Federal Constitution.—Supreme Court Opinions.*—The construction placed upon the provisions of the federal Constitution by the Supreme Court of the United States is adopted by the courts of the several states.  
*Sperry & Hutchinson Co. v. State*, 173, 179 (4).

## COURTS—Continued.

5. *Opinions.—Precedents.—Dicta.*—Where an opinion rests upon two distinct grounds, either of which is sufficient to support the conclusion, neither ground can be ignored as *obiter dictum*.  
*Vandakia R. Co. v. Schnull*, 87, 93 (8).
6. *Stare Decisis.—Boundaries.*—The rule that a conveyance of land bounded by a lake or swamp of circular or irregular form carries title to submerged land within the limits of the subdivision described in the conveyance, though open to criticism, will be followed under the doctrine of *stare decisis*.  
*Tolleston Club, etc. v. Carson*, 642, 655 (3).

## CRIMINAL LAW.

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| <ol style="list-style-type: none"> <li>I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL, 1-3.</li> <li>II. FORMER JEOPARDY, 4-7.</li> <li>III. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION AND SUMMARY TRIAL, 8-12.</li> <li>IV. ARRAIGNMENT AND PLEAS, 13-19.</li> </ol> | <ol style="list-style-type: none"> <li>V. EVIDENCE—ADMISSIBILITY, 20-41.</li> <li>VI. TIME OF TRIAL AND CONTINUANCE, 42-48.</li> <li>VII. TRIAL, 49-65.</li> <li>VIII. MOTION IN ARREST, 66, 67.</li> <li>IX. JUDGMENT AND SENTENCE, 68-71.</li> <li>X. APPEAL AND ERROR, 72-112.</li> </ol> |
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See also ARSON; ASSAULT AND BATTERY; BANKS AND BANKING; BRIBERY; CONSPIRACY; EMBEZZLEMENT; GRAND JURY; HOMICIDE; INDICTMENT AND INFORMATION; INTOXICATING LIQUORS; RAPE; RECEIVING STOLEN GOODS.

## I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

1. *Definition.*—Under §237 Burns 1914, §237 R. S. 1881, all crimes in this state are statutory.  
*Hinshaw v. State*, 147, 150 (1).
2. *Manslaughter. — Definition.—Common-Law.—Construction.*—Since §2239 Burns 1914, Acts 1905 p. 584, §351, defining manslaughter, was adopted bodily from the common law, the legislature must have intended to adopt the common-law meaning of the words used.  
*Dunville v. State*, 373, 375 (1).
3. *Self-Defense.—Right to be in Place.—Defendant's Belief.*—The defendant's belief that he is in a place where he has a right to be, coupled with the fact that he is so suddenly attacked with a deadly weapon that there is no opportunity to escape, perfects a right of self-defense; the belief alone goes only to rebut his bad faith in bringing on the conflict.  
*Colondro v. State*, 533, 535 (1).

## II. FORMER JEOPARDY.

4. *Acquittal.*—The acquittal of an accused in a criminal proceeding is not a bar to a second prosecution where the facts necessary to a conviction therein would not necessarily have convicted in the former prosecution. *Barker v. State*, 263, 274 (16).
5. *Acquittal.*—A defendant in a criminal prosecution who has pleaded not guilty to a valid indictment, and has been acquitted in a trial before a jury lawfully empaneled and sworn, cannot be legally tried again for the same offense.  
*Barker v. State*, 263, 274 (15).
6. *Burden of Proof.*—A former acquittal is in the nature of an affirmative defense, and the burden of proving it is on the defendant.  
*Barker v. State*, 263, 273 (14).

## CRIMINAL LAW—Continued.

7. *Overruling Plea of.—Harmless Error.*—Since evidence of former jeopardy is admissible under a plea of not guilty (§2069 Burns 1914, Acts 1905 p. 584, §198), the sustaining of a demurrer to a special plea thereof was not harmful error.  
*Barker v. State*, 263, 266 (1).
- III. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, OR SUMMARY TRIAL.
8. *Affidavit.—Jurat.—Character of Officer.*—An affidavit is not defective for failing to show the official character of the officer who administered the oath.  
*James v. State*, 579, 583 (4).
9. *Affidavit.—Bribery.—Words Descriptio Personæ.*—An affidavit under §2425 Burns 1914, Acts 1905 p. 584, §519, relating to bribery of public officials, charging that a township trustee entered into contract with the defendant, "agent of" a named company, was not insufficient, and cannot be construed as alleging that the contract was made by the defendant on behalf of the company, the words following the defendant's name being *descriptio personæ*.  
*Clevenger v. State*, 592, 594 (1).
10. *Affidavit.—Bribery.—Sufficiency as Showing Knowledge.*—An affidavit for bribery, under §2425 Burns 1914, Acts 1905 p. 584, §519, which charged in substance that B was the duly elected and qualified trustee of a certain township, that as such trustee he entered into a contract with the defendant for the repair of a furnace in a high school building of the township, and that the defendant unlawfully, feloniously and corruptly paid B, trustee, a certain sum as a percentage, reward, etc., in violation of the statute, was not insufficient as against the objection that it failed to allege that the defendant knew that B was then a township trustee, since the allegations, when considered together, sufficiently show such fact.  
*Clevenger v. State*, 592, 595 (2).
11. *Discharge of Defendant.—Motion.—Sufficiency.*—The defendant's motion for a discharge, under §2091 Burns 1914, Acts 1905 p. 584, §220, because of delay in the trial, was properly denied where the motion failed to show that the delay was not due to his own act, in view of the rule that a party claiming the benefit of a statute must bring himself clearly within its provisions.  
*Barker v. State*, 263, 267 (3).
12. *Illegal Sale of Intoxicating Liquors.—Affidavit.—Sufficiency.*—An affidavit in a city court, under §8356d Burns' Supp. 1914, Acts 1917 p. 15, charging that the defendant, on a certain date, unlawfully kept intoxicating liquors in the city, county and state with intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons unknown within the state, being in the language of the statute, is not objectionable on the ground that it fails to charge that such liquors were kept for sale within the state.  
*Schulmeyer v. State*, 463, 465 (1).

## IV. ARRAIGNMENT AND PLEAS.

13. *Appointment of Special Prosecutor.—Presumption.*—The action of the trial court in appointing a special prosecuting attorney, who acted as such before the grand jury that returned an indictment against a deputy prosecuting attorney, and to which objections were raised by plea in abatement, will be pre-

## CRIMINAL LAW—Continued.

- sumed to be correct on appeal, in the absence of a showing of the facts that were before the court at the time of the appointment.  
*Williams v. State*, 283, 301 (18).
14. *Challenge of Grand Juror*.—Section 1965, cl. 7, Burns 1914, Acts 1905 p. 584, §97, permitting one charged with a felony to challenge an individual grand juror before the jury is sworn on the ground that he cannot act impartially and without prejudice to the substantial rights of the challenger, does not permit the challenge for such cause by plea in abatement after indictment.  
*Williams v. State*, 283, 298 (15).
15. *Demurrer to Plea in Abatement*.—*Admission*.—A demurrer to a plea in abatement admits all the facts of the plea well pleaded.  
*Williams v. State*, 283, 300 (16).
16. *Negating Defenses*.—A plea in abatement to an indictment must anticipate and exclude all such supposable matter as would, if alleged by the opposite party, defeat the plea.  
*Smith v. State*, 501, 503, 504 (2).
17. *Negating Defenses*.—*Sufficiency*.—Though it may be presumed that the proceedings of the grand jury are regular, it may also be a fact that they are defective, and ignorance alone of the defect is not sufficient to excuse a delay of eighteen months in attacking the indictment by a plea in abatement for irregularity in the organization of the grand jury; ignorance after due diligence to learn is the only sufficient excuse for such delay.  
*Smith v. State*, 501, 503, 504 (4).
18. *Validity*.—A plea in abatement not denying the merits of a prosecution, and only tending to delay the remedy, will be upheld only after strict construction.  
*Williams v. State*, 283, 301 (17).
19. *Standing Mute*.—Where the defendant stands mute or refuses to plead to the charge, it is the duty of the court to enter a plea of not guilty.  
*Bennett v. State*, 381, 386 (7).

## V. EVIDENCE—ADMISSIBILITY.

20. *Admission Before Grand Jury*.—In a prosecution of a county official for unlawfully receiving compensation in addition to his salary, it was error to refuse to permit a member of the grand jury to repeat what the defendant had stated as a witness before that body for the purpose of showing that the defendant admitted that the claim purporting to be for expenses was not for expenses personally incurred, the purpose not being to convict the defendant of perjury, nor to ascertain whether his later testimony was consistent with his testimony before the grand jury.  
*State v. Brumfiel*, 584, 586 (2).
21. *Admission*.—In a statutory rape case, the court properly permitted a witness to detail a conversation had with the defendant before the offense was committed, in which the witness told the defendant that he had no business to go with the prosecuting witness and, in reply to which, the defendant said that they would not catch him and that it would be all right if they should, such testimony being competent to show the acquaintance, associations and familiarity of the parties.  
*Koehler v. State*, 387, 390 (4).
22. *Admission of Evidence*.—*Objections*.—Even if it was improper for the prosecuting attorney to ask the defendant

## CRIMINAL LAW—Continued.

on cross-examination whether he was thrown out of certain lodges for immorality, there was no error in admitting it over the objection that the question was improper "for the reason that secret societies are not subject to the same sort of investigations as persons" and their laws "might be different from the laws of the courts \* \* \* with right of appeal."

*Koehler v. State*, 387, 391 (5).

23. *Affidavit Showing Conviction in City Court.—Submission to Jury.—Reversible Error.*—On the trial in the criminal court on appeal from a conviction in the city court, it was error to submit to the jury, over the defendant's objection, the affidavit upon which the prosecution was based, which was taken to the jury room, where such affidavit contained an indorsement showing the conviction and the fine imposed in the city court.

*Staub v. State*, 683.

24. *Bribery.—Proof of Payments in Other Counties.—Sufficiency.*—In a prosecution for bribery of a township trustee, under §2425 Burns 1914, Acts 1905 p. 584, §519, evidence of payments by the defendant to such trustee in counties other than that of the venue would not be sufficient to show payment of the bribe as charged in the county of the venue, but could be considered only as bearing on the purpose of payment in case the jury found from other evidence that such payment was made; and, where there was a sharp conflict in the evidence relating to the payment made in the county of the venue as charged, it was error to refuse an instruction limiting the application of the evidence as to the payments in the other counties.

*Clevenger v. State*, 592, 600, 602 (4).

25. *Credibility.*—Where circumstances, created by the accused or by accident, point to a third person as guilty, the state may interpose defenses for such person, even though the evidence has a tendency to fortify such person as a witness.

*Berry v. State*, 102, 110 (4).

26. *Conclusion.—Harmless Error.*—In a prosecution for the violation of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, where the evidence in behalf of the defendant showed conclusively that a bottle contained intoxicating liquor, the statement of a witness for the state that the bottle contained whisky, if improper as a conclusion, was harmless.

*Dillon v. State*, 603, 605 (3).

27. *Counties.—Presenting False Claims.—Evidence.—Admissibility of Claim.*—In the prosecution of a county official for unlawfully receiving compensation in addition to his salary, it was error to refuse to admit in evidence instruments purporting to be the defendant's claim and the warrant drawn therefor, on the defendant's objection that they were not for compensation for services that the defendant was obligated to render for the reasons that the claim appeared on its face to be for "expense," and that the words "G. R. C. Fund" appearing on the warrant, as shown by the defendant's preliminary examination, meant "gravel road construction and expense fund," where the state offered to show that the defendant had not incurred any expense in reference to any of the matters mentioned in the claim; the mere verbiage of the instruments, in view of the offered evidence, could not foreclose the charge in the indictment.

*State v. Brumfiel*, 584, 585 (1).

## CRIMINAL LAW—Continued.

28. *Instruction.—Harmless Error.—Witnesses.*—In a prosecution for murder, resulting in a conviction for manslaughter, an instruction that, if the jury believed from the evidence that the moral character of any witness had been successfully impeached on the trial, then that fact might be considered in estimating the weight of his testimony, was erroneous where there was no evidence on the subject; but, the instruction being on a subsidiary matter, the error was harmless, in view of evidence conclusively establishing the defendant's guilt as found by the verdict. *Colondro v. State*, 533, 536 (4).
29. *Instructions.—Bill of Exceptions.*—The instructions in a criminal case can be made a part of the record only by a bill of exceptions, and there must be an affirmative showing that the bill of exceptions was filed with the clerk as required by §2163 Burns 1914, Acts 1905 p. 584, §287, after it had been signed, which matters cannot be shown by recitals in the bill or by the file mark of the clerk. *Barker v. State*, 493, 494 (1).
30. *Inference.—Conspiracy.—Declarations of Coconspirators.*—In a prosecution for conspiracy to commit a felony, under §§2647, 2260 Burns 1914, Acts 1905 p. 584, §§641, 371, there was no error in admitting evidence of declarations of the defendant's coconspirators, made in the absence of the defendant eight months before the commission of the alleged felony, in view of evidence warranting the inference that the defendant, though not one of the original conspirators, joined the conspiracy. *Roberts v. State*, 713, 718 (6).
31. *Instructions.—Character.—Character of Codefendants.*—In the prosecution of a defendant for conspiracy, an instruction that evidence concerning an offense of a codefendant should be considered by the jury in determining the guilt or innocence of the defendant, if it in any way applied to the conduct of the defendant, was erroneous. *Pierson v. State*, 239, 245 (3).
32. *Intoxicating Liquors.—Opinion Evidence.*—In a prosecution for keeping intoxicating liquors with intent to sell, etc., in violation of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, testimony of a witness that a bottle found in the defendant's possession contained whisky, which he knew by the odor, was admissible as an opinion of the witness. *Dillon v. State*, 603, 605 (4).
33. *Intoxicating Liquors.—Keeping Place.—Circumstantial Evidence.—Instruction.*—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689, in which there was no direct evidence that the defendant kept, ran or operated the place for the illegal sale of intoxicants, or that he had any interest therein or in the liquor sold, but there was evidence that at times he brought intoxicating liquors into a gambling room from an adjoining barroom and served it to the gamblers, and collected the money therefor, and that he operated the gambling game at times and frequently admitted persons to the room, the evidence also showing that other patrons of the gambling room performed the same acts at times, the Supreme Court cannot say that it was harmless error to refuse to instruct that, before the jury could convict on circumstantial evidence alone, the circumstances must be so convincing as to be inconsistent with any reasonable hypothesis of innocence, it being the defendant's contention that the facts could be reconciled on the theory that he

## CRIMINAL LAW—Continued.

- performed such acts as a frequenter of the place and for the accommodation of others. *Robinson v. State*, 467, 470, 471 (2).
34. *Previous Acts.—Admissibility.*—In a prosecution of a defendant, under Acts 1907 p. 85, for having carnal knowledge of a female child under sixteen years of age, there was no error in permitting the prosecuting witness to answer questions as to other acts of intercourse had with the defendant within the period of two years previous to the date alleged in the indictment, such evidence being admissible to show the lustful disposition of the defendant and the existence and continuance of the illicit relation. *Barker v. State*, 263, 271 (12).
35. *Proof of Other Crimes.—Purpose.*—In a criminal prosecution, proof of the commission of other criminal acts is admissible for the purpose of showing motive, criminal intent or guilty knowledge, where such motive, intent or knowledge is an essential ingredient of the crime charged.  
*Clevenger v. State*, 592, 602 (5).
36. *Reputation.—Instructions.*—An instruction relative to the purpose of evidence of the defendant's reputation for morality which precluded a consideration of such evidence for any purpose other than in connection with the rest of the evidence, in determining the defendant's guilt or innocence, was erroneous, in view of the evidence and punishment assessed.  
*Scherer v. State*, 14, 19 (9).
37. *Reasonable Doubt.—Essential and Subsidiary Facts.*—Subsidiary facts need not be proved beyond a reasonable doubt to justify a conviction; it is the facts essentially necessary to constitute the crime that must be so proved; but, since a reasonable doubt as to the essential facts may arise from a consideration of evidence adduced in support of subsidiary facts, it was error for the court to give an instruction that excluded evidence bearing on the question of reasonable doubt from the consideration of the jury by the statement that a reasonable doubt could not spring from subsidiary evidence. (*Hauk v. State*, 148 Ind. 248, disapproved in part.)  
*Sharp v. State*, 276, 279, 281 (4).
38. *Reasonable Doubt.—Subsidiary Evidence.*—The rule requiring the state to prove the defendant's guilt beyond a reasonable doubt applies only to the essential facts constituting the crime charged, and has no application to the proof of subsidiary facts that are not essential elements of the crime but which, if shown, tend to prove or to disprove one or more of the essential elements.  
*Sharp v. State*, 276, 279 (3).
39. *Reasonable Doubt.—Material and Incidental Facts.*—Ultimate or material facts are those essential in charging an offense and must be proved beyond a reasonable doubt; while incidental or subordinate facts need not be so proved.  
*Scherer v. State*, 14, 18 (7).
40. *Sufficiency.—Review.*—Where, in a prosecution for bribery, the evidence was conflicting on the issue as to whether the defendant, on the alleged date of the bribery, had a contract with another who was acting in his official capacity as township trustee, the court on appeal will not disturb the jury's verdict of guilty, the presumption being that the trial court heard all the evidence and considered it sufficient to sustain the verdict.  
*Clevenger v. State*, 592, 595 (3).



## CRIMINAL LAW—Continued.

41. *Sufficiency.—Circumstantial Evidence.*—To warrant a conviction in a criminal case on circumstantial evidence, the proof must not only coincide with the hypothesis of guilt but it must be inconsistent with any other rational conclusion.

*Robinson v. State*, 467, 469 (1).

## VI. TIME OF TRIAL AND CONTINUANCE.

42. *Absence of Counsel.*—Where the defendant's motion for a continuance, filed on the day of trial, rested solely on his own affidavit, which stated as a ground that the attorney depended on to make an active defense for him declined to appear because of his wife's illness, and that the defendant had no knowledge thereof until the day before the trial, the court on appeal will not disturb the overruling of the motion as an abuse of discretion, where there is a showing of record that at least ten days prior to the day set for the trial the defendant was represented by other counsel, and that throughout the trial he was ably represented.

*Roberts v. State*, 713, 715, 716 (1).

43. *Continuance.—Absence of Witness.*—Where a defendant seeking a continuance because of the absence of a witness brings himself within the requirements of the statute, he can demand a continuance as a matter of right, unless the prosecuting attorney will admit the truth of the facts which the defendant alleges that he can prove by the absent witness.

*Roberts v. State*, 713, 716 (3).

44. *Absent Witnesses.—Discretion.*—Where the defendant filed a legally sufficient affidavit for a continuance, on account of the absence of witnesses, under §2089 Burns 1914, Acts 1905 pp. 584, 631, and the prosecuting attorney refused to admit all the material and relevant facts that the defendant alleged that he could prove by the absent witnesses, the court had no discretion in the matter, as the defendant was entitled to a continuance as a matter of right, a partial admission of such facts being insufficient. (*Detro v. State*, 4 Ind. 200; *Connors v. State*, 183 Ind. 618, distinguished.)

*Torphy v. State*, 30, 35 (2).

45. *Absent Witnesses.—Prosecutor's Admission.*—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689, the statement, in the defendant's legally sufficient affidavit for continuance, that absent witnesses would testify that no illegal sales of intoxicating liquors were made at the time alleged by the state, was the statement of a material and relevant fact, and, on the refusal of the prosecuting attorney to admit the truth thereof, it was error to refuse a continuance, in view of §2089 Burns 1914, Acts 1905 pp. 584, 631.

*Torphy v. State*, 30, 33 (1).

46. *Discretion of Court.*—A motion for a continuance, filed on the day of trial, on the ground that one of the defendant's attorneys declined to appear because of the illness of his wife, calls into action the sound discretion of the trial court, there being no statute making the absence of counsel a ground for continuance, except where the attorney for the party applying is a member of the general assembly.

*Roberts v. State*, 713, 716 (2).

47. *Judicial Knowledge.—Matters of Record.*—Where a motion for continuance calls into action the discretion of the trial court, the court will take judicial knowledge of the pending proceedings, the facts disclosed by the record and all the cir-

## CRIMINAL LAW—Continued.

cumstances obviously open to it as a basis for exercising its discretion.

*Roberts v. State*, 713, 716 (4).

48. *Organization of Grand Jury.—Calling Bystander.*—A plea in abatement to an indictment for assault and battery with intent, based on irregularity in the organization of the grand jury through the improper substitution of a bystander for an excused member, was insufficient as against a demurrer where the record shows that the defendant, before the filing of the plea, made several requests for continuances, with actual or constructive knowledge of the facts, the requests under such circumstances constituting a waiver of the right to make such attack.

*Smith v. State*, 501, 503, 505 (3).

## VII. TRIAL.

49. *Erroneous Instruction.—Exclusion of Evidence.—Reversible Error.*—In a prosecution for rape upon a female child under the age of consent, an instruction that excluded from the consideration of the jury evidence, though subsidiary, as to the date on which the offense was committed, and which tended to break down the essential fact that the child at the time was under the age of consent, constituted such error that the Supreme Court cannot say that the defendant was so clearly guilty as to render the instruction harmless, though the fact of intercourse was not disputed.

*Sharp v. State*, 276, 281 (5).

50. *Evidence.—Instructions.—Province of Jury.*—An instruction that, by constitutional provision, the jury was the judge of the law and facts, and that undertook to explain the jury's duty within the meaning of the constitutional provision and to admonish as to the law's safeguards to society, is held not objectionable as an invasion of the province of the jury.

*Scherer v. State*, 14, 21 (10).

51. *Instructions.—Given and Refused.*—Tendered instructions that were covered by others given were properly refused.

*Barker v. State*, 263, 270 (9).

52. *Instructions.—Requests.*—If the defendant desired certain principles more particularly applied to his theory of defense, he should have tendered instructions on this phase of the case.

*Colondro v. State*, 533, 535 (2).

53. *Instructions Considered as a Whole.—Reasonable Doubt.*—An instruction on the subject of reasonable doubt, though incomplete, was not erroneous, when considered with another instruction that fully stated the law on the subject.

*Hinshaw v. State*, 447, 460 (16).

54. *Instructions.—Right of Jury to Determine Law.*—An instruction on the right of the jury to determine the law and its duty to consider instructions, is reviewed and held not objectionable as taking from the jury its freedom to judge the law, on the authority of *Blaker v. State*, 130 Ind. 203.

*Hinshaw v. State*, 447, 461 (17).

55. *Instructions.*—An instruction in a rape case that, if the jury were convinced beyond a reasonable doubt that the defendant was guilty of some one of the offenses included in the indictment, but entertained a reasonable doubt as to which offense he was guilty of, then they should find him guilty of the lowest offense, was not erroneous, since it was substantially in the language of the statute, and for the further reason that other

## CRIMINAL LAW—Continued.

- instructions on the subject so clearly advised the jury that it could not have been misled. *Koehler v. State*, 387, 392 (7).
56. *Instructions Contrary to Evidence.—Refusal.*—Instructions assuming that there was no evidence tending to show that an accused's reputation for truth, veracity, and moral character was not good, were properly refused where three witnesses had testified that his reputation for morality was bad. *Barker v. State*, 263, 270 (10).
57. *Instructions.—Prejudicial Error.—Character.*—Where the evidence is wholly circumstantial and contradictory, instructions permitting the jury to consider the defendant's character and prior convictions in determining his guilt were prejudicial. *Pierson v. State*, 239, 246 (4).
58. *Instructions.—Reasonable Doubt.—Harmless Error.*—An instruction on reasonable doubt, which required the jury to consider the evidence as a whole, and stated that "acts when considered apart from all other evidence may appear innocent, but when considered with other evidence may import guilt," objected to as an invasion of the province of the jury, is subject to criticism, in that the same consideration may import innocence as well as guilt, but the instruction, considered as a whole, is held harmless. *Scherer v. State*, 14, 18 (5).
59. *Instruction.—Province of Jury.—Invasion.*—Article 1, §19, of the Constitution, giving the jury the right to determine the law and the facts in criminal cases, does not deprive the court of the right to advise the jury as to the law applicable. *Scherer v. State*, 14, 18 (6).
60. *Instruction.—Sufficiency.—Reasonable Doubt.*—Instructions on reasonable doubt, though not containing all the definitions on the subject, were sufficient, where, considered together, they told the jury that, if it could reconcile evidence upon any reasonable hypothesis consistent with the defendant's innocence, it was its duty to do so. *Scherer v. State*, 14, 19 (8).
61. *Instructions.—Duty of Jurors.*—An instruction making it the duty of each juror to consult and deliberate with his fellow jurors, and stating that if any juror, after considering all the evidence, the argument of counsel, the instructions of the court, and after having fully consulted and deliberated with his fellow jurors, should be convinced beyond a reasonable doubt of the defendant's guilt as charged, it would be his duty to refrain from voting for an acquittal, or, if not so convinced, after having performed such duties, it would be his duty to refuse to vote for conviction, was not objectionable on the ground that it told each juror that, if, after deliberation, he once arrived at a conclusion of the defendant's guilt, it was his duty thereafter to refrain from voting for acquittal. *Hinshaw v. State*, 447, 459 (15).
62. *Verdict.—Certainty.—Place of Punishment.*—A verdict finding the defendant guilty as charged and assessing his punishment "at a fine of \$300, and imprisonment in the county jail for a period of three months, 90 days in the penal farm" was not ambiguous or uncertain as to the place of imprisonment, since, under §9926h Burns 1914, Acts 1913 p. 660, §8, it was the duty of the court to sentence the defendant to the Indiana State Farm, the term being fixed at ninety days. *Banks v. State*, 353, 355 (1).

## CRIMINAL LAW—Continued.

63. *Verdict.—Form.—Venire de Novo.*—In a criminal case, a motion for a *venire de novo* will not be sustained, unless the verdict is so defective and uncertain on its face that no judgment can be pronounced upon it; but the verdict, however informal, is good, if the court understands it when construed according to its reasonable intentment.

*Goodman v. State*, 70, 74 (5).

64. *Verdict.—Codefendants.*—Where the effect of an affidavit was to charge that each defendant was guilty of an offense stated therein, and the verdict finds that the defendants are guilty as charged, a fair construction of the language is that each of the defendants is guilty as charged.

*Goodman v. State*, 70, 74 (6).

65. *Verdict on One Count.—Effect on Other Counts.*—In a prosecution for violation of the Prohibition Act, a verdict that found the defendant guilty on the second count of the affidavit, but which was silent as to the first count, amounted to an acquittal on the first count.

*Ward v. State*, 606, 607 (1).

## VIII. MOTIONS IN ARREST.

66. *Arrest of Judgment.—Error Available.*—Anything in the affidavit that may be cured by evidence is not available in a motion in arrest of judgment.

*Jenkins v. State*, 510, 514 (5).

67. *Motion in Arrest.—Motion to Quash.—Testing Indictment.*—An indictment is not subject to the same test by a motion in arrest as it is by a motion to quash, as a motion in arrest presents only the questions that the offense was not committed within the jurisdiction of the court, and that the indictment does not state facts sufficient to constitute a public offense.

*Bass v. State*, 21, 22 (1).

## IX. JUDGMENT AND SENTENCE.

68. *Deferred Sentence.—Loss of Jurisdiction.*—Where a defendant was sentenced after two full court terms had elapsed and more than nine months after pleading guilty and seven months after his release from serving a sentence on a conviction of another offense during which time he was not in the custody of the court, the sheriff, or sureties, no cause for the delay being shown, the court had no jurisdiction to impose sentence, in view of §§202, 290, 295, Acts 1905 p. 584, §§2073, 2166, 2171 Burns 1914, providing for sentence unless there be cause for delay, or for placing the defendant in custody of the sheriff. (*Ledgerwood v. State*, 134 Ind. 81, distinguished.)

*Smith v. State*, 64, 66 (1).

69. *Deferring Sentence.—When Permissible.*—Courts may defer sentence to a subsequent day or term when justice demands it or for cause shown.

*Smith v. State*, 64, 69 (3).

70. *Sentence.—Rights of Defendant on Plea of Guilty.*—Where the defendant has pleaded guilty he need not require the court to perform its duty of pronouncing sentence in order to protect himself from the court's failure to act.

*Smith v. State*, 64, 68 (2).

71. *Sentence.—Place of Imprisonment.—Objection.*—A defendant, convicted of violating the "Blind Tiger" Act, should have

## CRIMINAL LAW—Continued.

presented the alleged error that he was sentenced to the county jail instead of the penal farm by a motion to modify the judgment and not by a motion for new trial. *Heier v. State*, 172.

## X. APPEAL AND ERROR.

72. *Bill of Exceptions.—Certification.*—A bill of exceptions certified by the trial court imports absolute verity.

*Hinshaw v. State*, 447, 458 (14).

73. *Bill of Exceptions.*—Instructions given and refused, and the exceptions arising therefrom, must be made part of the record by special bill of exceptions in order to present for review the rulings of the court thereon. *Goodman v. State*, 70, 73 (3).

74. *Bill of Exceptions.—Time for Filing.*—Where time beyond the term is desired for the filing of a bill of exceptions containing the evidence, under §287, Acts 1905 p. 584, §2163 Burns 1914, leave therefor must be given by the court at the time of the ruling on the motion for a new trial.

*Bass v. State*, 21, 24 (2).

75. *Bill of Exceptions.—Filing.—Certificate.—Record.—Discrepancy.*—Where a criminal case was terminated in the April term of court and the bill of exceptions was not filed until the September term, the record being silent as to any extension of time for the filing thereof, a recital in the judge's certificate that the bill of exceptions was tendered "within time allowed" does not show such conflict between the certificate and the order-book entry as to make the bill a part of the record, since the record discloses a failure to comply with §287, Acts 1905 p. 584, §2163 Burns 1914.

*Bass v. State*, 21, 24, 25 (3).

76. *Briefs.*—Alleged error of the court in finding for the state on the defendant's plea in abatement presents no question for review where such defendant fails to set out in his brief a copy, or the substance, of such plea and fails to show in the brief what disposition was made thereof.

*Bennett v. State*, 380, 386 (6).

77. *Briefs.*—In presenting the question of the sufficiency of the evidence, it is the appellant's duty to point out wherein the evidence is insufficient to support the verdict.

*Barker v. State*, 263, 269 (7).

78. *Briefs.—Sufficiency.*—The conclusions of counsel as to the facts established by the evidence is insufficient to present the question of the sufficiency of the evidence to sustain the verdict under Rule 22 of the Supreme Court, which requires a condensed recital of the evidence in narrative form.

*Barker v. State*, 263, 269 (6).

79. *Briefs.—Condensed Recital of Evidence.*—Where, from information contained in the appellant's brief, it may be assumed that causes in a motion for new trial are based on §2158, cl. 9, Burns 1914, Acts 1905 p. 584, §282, which provides that a new trial shall be granted when the verdict of the jury is contrary to law, or is not sustained by sufficient evidence, the court on appeal, under the fifth clause of Rule 22, will look to the appellant's condensed recital of the evidence in the consideration of such question.

*Barker v. State*, 263, 268 (5).

80. *Briefs.—Sufficiency.*—The rules of the Supreme Court require that the appellant's brief shall be so prepared that the

## CRIMINAL LAW—Continued.

questions presented can be intelligently considered by the court without resort to the record; and all questions in the presentation of which there has not been a good-faith effort to comply with such rules will be deemed as waived.

*Barker v. State*, 263, 268 (4).

81. *Briefs.—Reasons for Giving Requested Instruction.*—Alleged error in the refusal of an instruction relative to the misconduct of counsel presents no question for review where the appellant's brief contains no statement of the record showing any reason for the giving of such instruction.

*Barker v. State*, 263, 270 (11).

82. *Briefs.—Sufficiency.*—Where an appellant in a criminal case fails to group his points and authorities under proper headings, or to apply his propositions to the particular circumstances in issue, the Supreme Court, under the rules of briefing, would be justified in affirming a judgment of conviction.

*Bleiweiss v. State*, 184, 185 (1).

83. *Briefs.—Sufficiency.*—Where a defendant in a criminal case sets out in his brief as error the overruling of motions to quash the affidavit, to continue the cause, and for new trial, but sets out neither a copy of the affidavit nor copies of such motions, the brief is insufficient to present error under the fifth clause of Rule 22 of the Supreme Court, which requires a concise statement of so much of the record as presents every error relied on.

*Solimeto v. State*, 170, 171 (1).

84. *Briefs.—Sufficiency.*—Where the appellant's brief fails to make clear what error is complained of, and is in such condition that the question whether error was committed cannot be determined from it, the court on appeal will not search the record to find error, in view of the fifth clause of Rule 22.

*Wheeler v. State*, 228.

85. *Discretion of Court.—Denial of Change of Venue.*—It cannot be said that the trial court abused its discretion in denying a change of venue, based on the ground that publications had excited and prejudiced the people against the defendant, where the record fails to show that copies of the publications, or the substance thereof, were presented to the trial court, the defendant stating only his opinion as to the effect thereof.

*Hinshaw v. State*, 447, 458 (12).

86. *Discretion of Court.—Presumption.*—A motion for continuance, because the defendant's counsel declined to appear on account of his wife's illness, called for the judicial discretion of the trial court, and the court on appeal will assume that a ruling denying the motion was made in the belief that no injustice would result to the defendant thereby; the ruling of the trial court under such circumstances will not be disturbed on appeal, unless it clearly appears that there was an abuse of discretion to the harm of the defendant.

*Roberts v. State*, 713, 717 (5).

87. *Evidence.—Weight.*—Where there was some evidence to support a conviction, the court on appeal will neither disturb the judgment, nor rule, as a matter of law, that the judgment is contrary to law, on the ground of insufficiency of the evidence.

*Dillon v. State*, 603, 606 (5).

88. *Evidence.—Sufficiency.*—In determining the sufficiency of the evidence to support the verdict, or the finding, the court on

## CRIMINAL LAW—Continued.

- appeal will consider not only the positive testimony of witnesses but also such inferences as flow naturally from the facts established. *Schulmeyer v. State*, 464, 466 (3).
89. *Evidence.—Weight.*—In determining whether the verdict is sustained by sufficient evidence a court of appeal will not weigh conflicting evidence, but will consider only the evidence tending to support the judgment. *Barker v. State*, 493, 495 (3).
90. *Evidence.—Sufficiency.—Reasonable Doubt.*—It is not necessary on appeal from a conviction that the evidence should show the defendant's guilt beyond a reasonable doubt in order to sustain the verdict; all that is required is that there shall be some evidence sustaining every material allegation of at least one count of the affidavit. *Barker v. State*, 493, 495 (2).
91. *Evidence.—Weight.*—Though the uncorroborated testimony of the prosecuting witness in a statutory rape case was contradicted by the defendant on every essential element, the court on appeal will not disturb the judgment on the evidence alone, unless there is such an absence of evidence in respect to an essential element as to present a question of law which must be decided in favor of the defendant. *Flinn v. State*, 531, 532 (2).
92. *Evidence.—Verdict.*—In determining the sufficiency of the evidence to support the verdict, the Supreme Court will not weigh conflicting evidence, but will consider only the evidence most favorable to the appellee. *Barker v. State*, 263, 269 (8).
93. *Evidence.—Sufficiency.*—To present error on the ground of insufficiency of the evidence, one must show that there is a complete failure of evidence on a material issue. *Berry v. State*, 102, 108 (1).
94. *Evidence.—Reversal.*—A judgment will not be reversed for lack of evidence, unless some essential element of the case is wholly unsupported by evidence. *Goodman v. State*, 70, 73 (2).
95. *Evidence.—Weight.*—Although the evidence is conflicting and contradictory, the court on appeal will not weigh it, as it will be held sufficient if, standing alone and with the inferences drawn therefrom, it supports the judgment. *Goodman v. State*, 70, 72 (1).
96. *Evidence, Weight and Sufficiency.—Credibility of Witnesses.—Alibi.—Verdict.*—The court on appeal will not weigh the evidence as to whether the accused was at the scene of the crime, where there was some evidence of his presence there at the time, since the weight of the evidence and the credibility of witnesses are questions for the jury; and where the jury found against the defendant, and the trial court denied a motion for new trial, the Supreme Court will assume that the court and jury have faithfully discharged their respective duties. *Berry v. State*, 102, 109 (2).
97. *Harmless Error.—Remarks of Court on Testimony.*—In a prosecution for murder, resulting in a conviction for manslaughter, the remark of the trial judge, in reference to an exception taken by counsel for the defendant during the latter's examination, that the question was not improper as assuming anything, because the defendant "testified about going forward and going away and going back," though erroneous, was harmless where the evidence conclusively established the defendant's guilt as found by the verdict. *Colondro v. State*, 533, 539 (5).

## CRIMINAL LAW—Continued.

98. *Harmful Ruling.—Duty to Show Error.*—It is the duty of one who assigns as error the sustaining of a demurrer to a special plea to show that such ruling deprived him of an advantage that was not, or could not be, accorded him under the general issue, since the burden of showing error is on the appellant.  
*Barker v. State*, 263, 267 (2).
99. *Instructions.—Presumptions.*—Since it is the duty of the court to instruct in writing when requested, the presumption on appeal is that the court did its duty, in the absence of a contrary showing.  
*Hinshaw v. State*, 447, 458 (13).
100. *Presumptions.*—The burden of making an affirmative showing of error is on the complaining party, and, in the absence of such showing, the court on appeal, as a general rule, will indulge all reasonable presumptions in favor of the rulings of the trial court.  
*Bennett v. State*, 380, 382 (3).
101. *Presumptions.—Instructions.*—Where all the instructions are not in the record and the defendant complains that, after proper and timely request to instruct the jury in writing, the judge read the indictment and the section of the statute defining the offense charged without copying them into the written instructions, it will be presumed on appeal, in the absence of affirmative showing to the contrary, that the judge complied with the request, either by copying the parts objected to into the instructions before reading them, or, on objection being made, by rereading the same after copying them into the instructions.  
*Bennett v. State*, 380, 382, (4).
102. *Presumptions.—Motion to Quash.*—The trial court having sustained a motion to quash the affidavit, the Supreme Court must assume, even though no valid reason was presented by the appellee, that the court knew a valid reason, and, if the Supreme Court can discover one, it will sustain the action of the trial court, since it will not be presumed that the trial court did not take notice of more than was presented by the motion sustained.  
*State v. Sarlin*, 359, 362 (3).
103. *Instruction Directing Verdict.—Record.*—An instruction directing a verdict in a criminal case must be made a part of the record in the same manner as other instructions in order to present questions thereon for review.  
*Goodman v. State*, 70, 73 (4).
104. *Record.—Motion for New Trial.*—Alleged errors that the verdict of the jury is contrary to law and that it is not sustained by the evidence, assigned as grounds for a new trial, present no question for review in the absence of the evidence from the record.  
*Bennett v. State*, 380, 386 (5).
105. *Review.—Motion in Arrest.—Ambiguity.*—The defendant's assertion that the purported paper termed the affidavit is not an affidavit, because it was stamped with a rubber stamp by the officer administering the oath, presents no question for review, it being ambiguous, uncertain and meaningless.  
*Dillon v. State*, 603, 605 (2).
106. *Review.—Ruling on Motion for Change of Venue.*—The ruling of the trial court on a motion for change of venue, as to the existence of excitement and prejudice, is a determination of an issue of fact and is conclusive on appeal.  
*Hinshaw v. State*, 447, 457 (11).



**CRIMINAL LAW—Continued.**

107. *Review.—Grounds.*—Where the defendant chose as grounds of his motion to quash the affidavit that the facts stated were not sufficient to constitute a public offense, he will not be permitted on appeal to attack the affidavit on a different theory; it is only where the court sustains the motion that the court on appeal will look beyond the grounds specified to sustain the court's action. *Jenkins v. State*, 510, 511 (3).
108. *Review.—Scope.*—Where there are specific objections to the admission of evidence, the implication follows that there are no others, or, if others, that they are waived; and a party may not make one objection in the trial court and another on appeal. *Koehler v. State*, 387, 391 (6).
109. *Review.—Evidence.—Weight.*—The Supreme Court will not disturb a judgment of conviction in a criminal case for insufficiency of evidence unless there is an entire failure of proof upon an essential element of the offense. *Bleiweiss v. State*, 184, 187 (5).
110. *Review.—Intent.—Proof.*—Where there is evidence in the record tending to show that the defendant, while operating an automobile in violation of §10476c Burns 1914, Acts 1913 p. 779, §14, and, with a reckless disregard for the safety of others, struck the defendant, who was on a motorcycle, there was sufficient showing to present an issue of fact as to the element of intent, and in such case the Supreme Court will not disturb the judgment. *Bleiweiss v. State*, 184, 186, 188 (4).
111. *Review.—Delayed Sentence.—Presumption.*—Where the record is silent as to the reason for the postponement of sentence upon a plea of guilty, the Supreme Court will not presume that the postponement was justifiable. *Smith v. State*, 64, 69 (4).
112. *Review.—Reservation of Grounds.*—In a criminal case, in order to present for review the form or substance of a judgment, the question must first be presented to the trial court by a motion to modify, specifically stating the defects or mistakes complained of, and the adverse ruling thereon must be assigned as error. *Goodman v. State*, 70, 74 (7).

**CROSS-ERRORS—**

Failure to assign, effect, see **APPEAL 16.**

**CROSS-EXAMINATION—**

See **WITNESSES 1.**

**DAMAGES—**

See also **BRIDGES; CARRIERS 6-8; FRAUD 1, 3, 4, 5, 7; JUDGMENT 3; NUISANCE 1; TRESPASS.**

1. *Discretion as to Amount.*—The amount of damages to be awarded for pain and suffering rests largely in the discretion of the jury, there being no exact standard for determining the question. *Jackson, Rec., v. Rutledge*, 415, 428 (12).
2. *Future Suffering.—Recovery.—Instructions.*—In an action for injuries, an instruction, although subject to criticism in that it told the jury that it might consider future pain and suffering, if any "likely" to occur, was not so misleading as to be reversible error; the more accurate rule is to limit such recovery to such pain as the injured party is reasonably sure to suffer. *Jackson, Rec., v. Rutledge*, 415, 431 (18).

**DAMAGES—Continued.**

3. *Loss of Leg.*—Where the plaintiff, who was thirty-six years of age, suffered injuries causing great pain, disqualifying him for the work in which he was engaged and necessitating an amputation of the leg below the knee and a second amputation above the knee when gangrene ensued, a verdict of \$20,000 in an action for the injury was not excessive, there being no evidence showing his earning capacity in other employments.  
*Jackson, Rec., v. Rutledge*, 415, 428 (11).
4. *Measure.—Permanent Injury.*—Where a portion of land is permanently appropriated by wrongful act, or where it is so occupied as to deprive the owner of the use or occupation thereof, the general rule as to the measure of damages is the appropriation or trespass.  
*Indiana Pipe Line Co. v. Christensen*, 400, 404 (4).
5. *Permanent Injury.—Evidence.*—In an action by a plaintiff for injuries to his land caused by crude oil that was carried from the defendant's defective pipe line by the waters of a creek and deposited on a part of the land, where the evidence showed only injury to products of the soil and that some of the plaintiff's stock was killed or injured by eating grass or drinking water contaminated with oil, but failed to show that the fertility or productive value of the soil was destroyed thereby, a verdict of \$17,000 must be deemed excessive.  
*Indiana Pipe Line Co. v. Christensen*, 400, 412 (12).

**DECEDENTS—**

See EXECUTORS AND ADMINISTRATORS.

**DECISIONS—**

See COURTS.

**DEDICATION—**

1. *Cemeteries.—User by Public.—Acceptance.*—Where land was deeded to a township trustee for use as a cemetery, the use thereof by the general public, and the care bestowed thereon by the successive trustees, made the dedication of the land as a cemetery irrevocable.  
*Sell, Trustee, v. State, ex rel.*, 671, 673 (3).
2. *Deed for Cemetery.—Acceptance by Trustee.—Effect.*—A township trustee's acceptance of a deed of land to him as trustee for cemetery purposes must be deemed to pass title to the township and to bind the grantors to a dedication.  
*Sell, Trustee, v. State, ex rel.*, 671, 673 (2).
3. *Deed to Township Trustee for Cemetery.*—A deed of land to a township trustee and his successors in office, to be used by the general public for a burying ground, and to be under the direction, care and superintendence of the trustees of the township, was sufficient to convey the land to the township, the establishment of suitable burial places being encouraged by public policy.  
*Sell, Trustee, v. State, ex rel.*, 671, 673 (1).
4. *Public Streets.—Effect as to Land Previously Sold.*—A grantor's conveyance by quit-claim deed of a right of way across unplatted land to a railroad company that was authorized, under Local Laws 1848 p. 176, to receive land in fee for such purpose, vested a fee-simple title thereto in the company,

**DEDICATION—Continued.**

and, though the width of such right of way was not specified, where the parties understood and intended it to be eighty feet, the grantor was without authority to dedicate such right of way as a part of a street in a subsequent plat of adjoining land.

*Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.*, 230, 237 (3).

**DEEDS—**

See ESCROWS; LIFE ESTATES.

Cemetery, acceptance by township, effect, see DEDICATION 2, 3; WILLS 5.

1. *Right of Way.—Evidence.—Acts and Declarations of Parties.—Construction.*—Where a deed conveying a right of way to a railroad company is silent as to the width thereof, in litigation concerning such right of way in which the width is important the contemporaneous acts and declarations of the parties to the deed, and also their subsequent acts performed before a controversy arises, are admissible to fix such width.

*Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.*, 230, 235 (1).

2. *Right of Way.—Failure to Fix Width.—Action.—Evidence.—Plat of Adjoining Tract.*—Where the same deed conveyed from the grantor to the defendant railroad company's predecessor a right of way through two adjoining tracts of land without specifying the width of such right of way, a plat of the tract adjoining the one in controversy which showed such width, and which was filed for record two years after the execution of the deed but many years before the controversy arose, was properly admitted in evidence in an action involving the width.

*Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.*, 230, 236 (2).

**DE FACTO OFFICERS—**

Election under invalid act, see OFFICERS 2, 3.

**DELIVERY—**

Element of escrow, see ESCROWS.

**DEMURRER—**

See PLEADING 1, 5, 7, 8.

Challenging sufficiency of complaint, see APPEAL 10, 23.

Overruling, when harmless, see APPEAL 37-39, 45.

Sustaining, when harmless, see APPEAL 41-43; CRIMINAL LAW 7.

**DISCHARGE—**

Motion, sufficiency, see CRIMINAL LAW 11.

**DISCRETION—**

Of courts, see CRIMINAL LAW 2, 42, 44, 46, 47, 85, 86; DIVORCE; INDICTMENT AND INFORMATION 14; JURY.

**DISMISSAL—**

See APPEAL 3, 11.

**DITCHES—**

See DRAINS.

**DIVORCE—**

1. *Alimony.—Amount.—Determination.—Discretion.*—In determining the proper amount of alimony, it was proper for the court to consider the financial situation of the plaintiff wife and the conditions surrounding her as disclosed by the evidence.  
*Van Natta v. Van Natta*, 75, 78 (3).
2. *Alimony.—Amount.—Discretion of Court.*—Under the evidence it was for the trial court to determine the amount and value of the defendant husband's property and, as bearing on his ability to pay alimony, the court had the right to consider the fair value of the property and to consider the defendant's age, his state of health and his earning capacity.  
*Van Natta v. Van Natta*, 75, 77 (2).
3. *Alimony.—Amount.—Discretion.*—Where there was evidence from which the court might have found that the defendant husband's property interests were worth from \$89,000 to \$115,000, it was not an abuse of the court's discretion to award the plaintiff wife \$25,000 alimony, \$25 per month for the care and custody of their only child, three years old, and \$1,800 as attorney's fees, although there was evidence tending to show the husband's property interests to be much less than either of the amounts stated.  
*Van Natta v. Van Natta*, 75, 77 (1).
4. *Alimony.—Discretion of Court.*—It is within the broad discretionary power of the court to determine the amount of alimony, and the court on appeal will not reverse the judgment awarding alimony unless it appears that the trial court abused its discretion.  
*Van Natta v. Van Natta*, 75, 78 (4).

**DOWER—**

1. *Lien on Land.—Power of Guardian to Create.*—The guardian of an insane husband has no power by his act or conveyance to extinguish or incumber the inchoate interest of the wife in such husband's realty.  
*Lawler v. Bear*, 308, 313 (8).
2. *Wife's Inchoate Interest.—Vesting.—Judicial Sale.*—Where the land of an insane husband is sold under order of the court, the wife's inchoate interest therein becomes vested as an absolute interest under §3052 Burns 1914, §2499 R. S. 1881.  
*Lawler v. Bear*, 308, 313 (7).
3. *Wife's Inchoate Interest.—Vesting.—Judicial Sale.*—Under §3052 Burns 1914, §2508 R. S. 1881, the inchoate interest of the wife in her husband's realty becomes an absolute vested interest whenever the husband's title therein vests absolutely in the purchaser at judicial sale.  
*Lawler v. Bear*, 308, 313 (6).
4. *Wife's Inchoate Interest.—Priority.*—Although money advanced by the guardian of an insane husband pursuant to orders of the court was paid mostly to the wife on certain oral statements and promises by her, and was used for her and the children's support, and for taxes, repairs, and insurance on the ward's realty upon which the wife and children resided, the guardian could not, in view of §3037 Burns 1914, §2499 R. S. 1881, acquire a lien on the realty that would supersede or displace the wife's inchoate interest in the ward's realty.  
*Lawler v. Bear*, 308, 312, 313 (5).

**DRAINS—**

See also EVIDENCE 4.

1. *Establishment.—Construction Along Line of Old Drain.*—The jurisdiction of proceedings to repair and enlarge an existing

**DRAINS—Continued.**

drain, under §§6141-6143 Burns 1914, Acts 1907 p. 508, is in the tribunal that established it. p. 28.

*Steenburg v. Kyle*, 26, 28 (1).

2. *Commissioners' Report.—Dismissal.—Amendment.*—Where a drainage proceeding was dismissed on the ground that the proposed work as reported by the commissioners was insufficient to drain the land, a request to amend the report, made twenty-three days after dismissal, was too late.

*Cromer v. Bridenbaugh*, 393, 398 (2).

3. *Commissioners' Report.—Illegality of.—Correction.*—Under §6141 Burns 1914, Acts 1907 p. 508, §2, requiring an accurate report of the drainage commissioners as a definite basis for the bidding of contractors, etc., a report delegating to the commissioner of construction the power to withhold payment of such part of the contract price as he might elect was unlawful, and, under §4 of the act (§6143 Burns 1914) the petition should have been referred back to the commissioners for correction.

*Moore v. Ryan*, 345, 352 (4).

4. *Commissioners' Report.—Sufficiency.—Amendment.*—Where a report of drainage commissioners called for construction of a new tile drain in the course of an old dredged ditch that was full in places and had no definite channel, and the court found that the proposed work as reported was insufficient, a request to amend the report so as to permit the old ditch to be left open as it then was as part of the new drain, without specifications as to its width, depth and slope, was too indefinite.

*Cromer v. Bridenbaugh*, 393, 399 (3).

5. *Construction.—Making Old Drain Part of New.—Sufficiency of Report.—Petitioners' Theory.—Effect on Appeal.*—Where a proceeding for the construction of a drain in the course of an old dredged ditch was dismissed on the ground of remonstrance that the work as reported was insufficient, and the record shows, by statements of the court and the petitioners' counsel, that the cause was tried on the theory that the report called for a new tile drain supplanting the old ditch, the petitioners' contention on appeal that, though the tile as specified would be insufficient, there were sufficient specifications reported to show that the new drain was to be supplemental to the old and that the latter was to remain open as it was at the time of the filing of the report, is of no avail; especially is this true where the record shows that such specifications relied upon by the petitioners were either required by statute, or were necessary, for proper construction of a new drain, and that the old ditch, through neglect, had become full in places and had no definite channel, but that no specifications were reported for its improvement, since under such circumstances the law would not permit the old ditch to remain an open channel without definite specifications as to its width, depth and slope.

*Cromer v. Bridenbaugh*, 393, 395, 396 (1).

6. *Construction.—Benefits.—Sufficiency of Evidence.*—In the trial of a remonstrance to a drainage proceeding, the commissioners' report alone is not sufficient to sustain a finding that the remonstrant would be benefited by the improvement to the extent of the assessments where the remonstrant, the only witness for the remonstrance, testified to facts showing the assessments to be in excess of the benefits.

*Moore v. Ryan*, 345, 350 (3).

**DRAINS—Continued.**

7. *Contracts.—Recovery of Value of Work After Annulment of Contract.*—Although a bid was attached to a contract for the construction of a ditch and levee showing that the total amount of the bid resulted from a calculation based on a price per cubic yard of earth in the levee, the contract was a unit and required the construction of the entire work; hence the contractor could not, after annulment, recover the value of the work done under §6144 Burns 1914, Acts 1907 p. 508, where its value was exceeded by the cost of its reconstruction after damage by unprecedented flood. *Prather v. Latshaw*, 204, 211 (3).
8. *Remonstrance.—Commissioners' Reports.—Evidence.—Presumption.*—On the trial of a remonstrance to the report of drainage commissioners, alleging that the remonstrant's land will not be benefited to the extent of the assessment, the report is only *prima facie* evidence of the matters contained therein, and is admissible only by virtue of the statute (§6151 Burns 1914, Acts 1907 p. 508); its only effect is to compel the remonstrants to go forward with the evidence sustaining the remonstrance, and when that is done, the presumption growing out of the *prima facie* case made by the report has served its function and cannot be considered for any other purpose. *Moore v. Ryan*, 345, 350 (1).
9. *Repair.—Jurisdiction.—Conclusiveness of Judgment.*—Where a drain affecting lands in adjoining counties was established by a proceeding in the circuit court of one of the counties, and thereafter, in a proceeding in the court of the other county, a new drain was established, under §§6141-6143 Burns 1914, Acts 1907 p. 508, over practically the same drainage course, the jurisdiction of the latter court cannot be attacked, in a subsequent proceeding in the former court to repair the drain, on the ground that the proceeding establishing the new drain was in fact nothing more than a proceeding to repair the old drain, since the court ordering the new drain had general jurisdiction of the subject-matter and the judgment therein cannot be attacked collaterally. *Steenburg v. Kyle*, 26, 28, 30 (2).

**DUE PROCESS—**

See CONSTITUTIONAL LAW 3-5; HIGHWAYS 3.

**EDUCATION—**

See COLLEGES AND UNIVERSITIES.

**ELECTION—**

Overruling motion, several counts based on same felony, see INDICTMENT AND INFORMATION 21.

**ELECTIONS—**

*Tie Vote.—Casting Lots.*—Section 15 of Acts 1905 p. 219, §8989 Burns 1914, which provides that, in case of a tie vote for candidates for office in town elections, the inspectors shall determine by lot which of them shall be declared elected, applies to all town elections and not only to the first election following incorporation, in view of §14 and the acts of 1909 and 1911 amending the act of 1905, and there being nothing in the history of the legislation to indicate a different construction.

*Arnold v. State, ex rel.*, 222, 227 (2).

**EMBEZZLEMENT—**

Bankers', indictment, sufficiency, see CONSPIRACY 12.

*Bankers' Embezzlement.—Indictment.*—The legislature intended that the requisites of pleading with reference to embezzlement were to apply to indictments for bankers' embezzlement as defined by §2294 Burns 1914, Acts 1907 p. 14, this construction requiring that the charge of *taking* and *receiving* be connected with the statement that such *taking* and *receiving* was by virtue of office, agency or employment.

*Hinslaw v. State*, 147, 156 (10).

**EMINENT DOMAIN—**

See CONSTITUTIONAL LAW 5.

1. *Compensation.—Public Improvements.—Benefits.*—Special assessments for local public improvements are levied on the theory that the lands affected are benefited to the extent of the assessments, and the special benefits are therefore regarded as just compensation for the amount levied.

*City of Indianapolis v. Bryan*, 586, 589 (3).

2. *General Tarration.—Highways.—Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) does not conflict with Art. 1, §12, of the state Constitution, which provides that no man's property shall be taken by law without just compensation, such prohibition not extending to the general taxing power of the state.

*Wright v. House*, 247, 258 (12).

**EMPLOYERS' LIABILITY—**

See APPEAL 29, 33; MASTER AND SERVANT 4-8, 10; NEGLIGENCE 2.

**EQUITY—**

See ASSIGNMENTS 1-4; CARRIERS 19.

**ESCROWS—**

*Deposit.—Release or Relinquishment of Deed.—Delivery.*—The statement of the testatrix in her will that she relinquished and released all right and control as to a certain deed, which, under the terms of the will, was to be held in trust by the executors of the will for the benefit of a minor child, is only one element of an irrevocable escrow or deposit, but is not controlling where other facts show the absence of such a delivery as is another and necessary element of such escrow or deposit.

*Nation v. Green, Exr.*, 697, 708 (7).

**ESTOPPEL—**

*Burden of Proof.*—A defendant relying upon estoppel of the plaintiff as a defense has the burden of proving it by a fair preponderance of the evidence.

*Citizens' Bank, etc. v. Opperman*, 212, 216 (4).

**EVIDENCE—**

Absence from record, effect, see APPEAL 5-9.

Receipt of, see CRIMINAL LAW; TRIAL.

Review of rulings as to evidence, see APPEAL; CRIMINAL LAW 20-41, 87-97.

For evidence in particular actions or proceedings, or as to particular issues, see also the various specific topics.

Admissions, see also CRIMINAL LAW, 20, 21.

**EVIDENCE—Continued.**

Burden of proof, see also **CRIMINAL LAW 6; ESTOPPEL; HIGHWAYS 7; HUSBAND AND WIFE 3; WILLS 1.**

Presumptions, see also **DRAINS 3.**

1. *Competency.—Admission of Similar Evidence of Adverse Party.*—In replevin by a married woman to recover bank stock on the ground that it was pledged by her husband for his debt, where the defendant pledgee's cashier had testified that he told the husband on delivery of the certificate of stock that it would be better to have it signed on the regular line, it having been signed in the wrong place, the defendant could not justly complain of the plaintiff's testimony that the husband returned the certificate and requested her to re-sign it and that he said when he made such request that "she had not signed it in the right place."

*Citizens' Bank, etc. v. Opperman, 212, 219 (9).*

2. *Expert Opinion.—Telephone Rates.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, testimony of an expert accountant who was experienced in telephone matters as to whether the cost of operating telephone plants within the last few years had increased, taking the telephone station as a unit, was admissible.

*Public Service Commission v. Frazer, 578, 576 (4).*

3. *Expert Testimony.—Knowledge.*—Witnesses who had any knowledge relative to the sufficiency of a proposed drain were properly permitted to testify as experts, the extent of their knowledge being a question of the weight, and not of the admissibility, of their testimony.

*Cromer v. Bridenbaugh, 393, 399 (4).*

4. *Expert Testimony.—Drains.*—In the trial of a remonstrance to a drainage proceeding, the exclusion of the testimony of a commissioner, who was not familiar enough with his own report to know the sizes of the tile provided for therein, was not error, since the report itself was in evidence and in that the witness had given his verified opinion as to the efficiency of the proposed drain.

*Cromer v. Bridenbaugh, 393, 399 (5).*

5. *Facts and Conclusions.*—In a replevin action by a married woman to recover bank stock on the ground that she allowed it to be pledged to secure her husband's debt, a question asking the husband whether the wife received anything from the pledgee when he got the stock certificate from her and gave it to the pledgee, was not improper as permitting the witness to decide one of the issues, since it called for a fact.

*Citizens' Bank, etc. v. Opperman, 212, 219 (8).*

6. *Parol.—Varying Written Instrument.*—In replevin by a married woman to recover bank stock on the ground that she allowed it to be pledged by her husband for his debt, she could explain the purpose and meaning of her written power of attorney and assignment of the stock, subject to the pledgee's right to show estoppel, notwithstanding the rule announced in the federal decisions construing the National Bank Act that an assignment of a certificate of national bank stock is complete without a transfer on the books of the bank.

*Citizens' Bank, etc. v. Opperman, 212, 220 (11).*

7. *Res gestae.—Hearsay.*—In replevin by a married woman to recover bank stock on the ground that she permitted her hus-



**EVIDENCE—Continued.**

band to pledge it for his debt, a conversation between the husband and wife at the time he applied for the certificate and she signed and delivered it to the effect that he wanted it to use as security for a loan, and also his statement, when he returned the certificate to have it re-signed, that "she had not signed it in the right place," were a part of the pertinent and material act of the procuring and delivery of the certificate and were admissible as part of the *res gestae*, such statements not being received as conclusive, but to assist in determining the true character of the transaction and as tending to show the intent of the wife in doing the act and that there was no real change of ownership.

*Citizens' Bank, etc. v. Opperman*, 212, 220 (10).

8. *Reasonableness of Rates.—Expert Opinion.*—On appeal to the circuit court from an order of the Public Service Commission fixing rates, testimony of an expert accountant experienced in telephone matters that eight per cent. was a reasonable return on the investment was admissible, since the risk involved depends upon the circumstances surrounding the investment and can be known only by one having such experience or technical knowledge as enables him to form an opinion on the subject, after having considered the interests of all concerned.

*Public Service Commission v. Frazee*, 573, 577 (6).

9. *Reasonableness of Rates.—Expert Opinion.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, testimony of an expert accountant experienced in telephone matters that it was not good business to allow a discount of ten to fifteen cents per month on rentals not paid in advance was admissible.

*Public Service Commission v. Frazee*, 573, 576 (5).

**EXCEPTIONS, BILL OF—**

See also APPEAL 5-9; CRIMINAL LAW 29, 72-75; PUBLIC SERVICE COMMISSION 5.

*Settlement.—Filing.—Nunc Pro Tunc Entry.*—Where the trial court, at the time of the overruling of a motion for new trial, failed to make an order-book entry showing that time was given the defendant to file a bill of exceptions, after the end of the term the only method of correcting the omission, so as to make a bill of exceptions filed after the term a part of the record, was by a motion for a *nunc pro tunc* entry.

*State, ex rel. v. Griffith, Judge* 167.

**EXECUTION—**

See also EXEMPTIONS; JUDGMENT 1; LIS PENDENS.

1. *Exemption.—Delay in Claiming.—Excuse.*—The delay of a judgment debtor to object to a sale on execution on the judgment until more than two months after the sale, urged as *laches* barring his suit to set the sale aside, was justified under allegations of the complaint showing that such debtor was at the time a resident of another county and had no notice or knowledge of the execution, levy and sale.

*Lockett v. Hammond*, 484, 490 (7).

2. *Setting Aside Sale.—Sufficiency of Pleading.*—A complaint of an execution debtor and another to set aside an execution sale of lots, alleging in substance that, after recovery of the judgment on which the execution was issued, the execution debtor

**EXECUTION—Continued.**

sold the lots, which after mesne conveyances came into the hands of the other plaintiff, that the execution debtor, at the time he sold the lots and at the time of the issuance of execution, levy and sale thereon, was not the owner of property in excess of \$600, and that his failure to claim exemption was due to the fact that he was living in another county and the execution was issued and the lots sold thereon without notice to him and without his knowledge or consent, was sufficient as against a demurrer for want of facts, though carelessly drawn and subject to a motion to make more specific.

*Luckett v. Hammond*, 484, 488 (3).

3. *Setting Aside Sale.—Intervention by Judgment Debtor in Suit by Purchaser.*—In a suit by the purchaser of land to enjoin an execution sale thereof on a judgment against the vendor, on the ground that the property was exempt when it was sold by the latter, equity permits the vendor to intervene, after the sale on execution, and to ask relief on the same ground, where there is a sufficient showing of his lack of notice or knowledge of the execution, levy and sale, and the issue presented is germane to the original proceedings.

*Luckett v. Hammond*, 484, 490 (9).

4. *Suit by Purchaser of Judgment Debtor to Set Aside Sale.—Parties.*—In a suit by the purchaser of land to enjoin an execution sale thereof to satisfy a judgment against the vendor, the vendor is not a necessary but a proper party, both being interested in the same general relief.

*Luckett v. Hammond*, 484, 490 (8).

**EXECUTORS AND ADMINISTRATORS—**

See also ESCROWS; WILLS.

1. *Costs of Administration.—Residuary Estate.*—The residuary estate is chargeable with only the ordinary and usual costs and expenses incident to the administration of the decedent's estate.  
*Nation v. Green, Exr.*, 697, 702 (2).
2. *Expenses.—Costs.—Trust Estate.—Minor Legatee.*—Where the executors of a will were also made trustees for the purpose of holding the legal title to certain land which was to pass to a foster child of the testatrix on her reaching the age of twenty-one, and the executors and trustees incurred expenses in defending a petition of the divorced husband of the testatrix for the appointment as guardian of such child and for a modification of the divorce decree as to the custody of the child, such costs and expenses were chargeable to the property held in trust for the child and not to the residuary estate.  
*Nation v. Green, Exr.*, 697, 709 (9).
3. *Inheritance Tax.—Liability of Residuary Estate.—Wills.*—In view of §§5, 7 of the Inheritance Tax Act, Acts 1913 p. 79, §§10143e, 10143g Burns 1014, the residuary estate is not chargeable generally with the inheritance tax upon other transfers, where the will neither expressly, nor by clear implication, charged the residuary estate therewith.

*Nation v. Green, Exr.*, 697, 702, 704 (3).

4. *Inheritance Tax.—Collection.—Source of Authority.*—In the collection of the inheritance tax, the executor, administrator or trustee does not necessarily act in his capacity as such, but under §5 of the act (Acts 1913 p. 79, §10143e Burns 1914), is

**EXECUTORS AND ADMINISTRATORS—Continued.**

personally responsible for the collection thereof as the agent of the state. *Nation v. Green, Exr.*, 697, 703 (4).

5. *Taxes on Land.—Life Estate.—Liability of Residuary Estate.*—Where a testatrix by the terms of her will placed a deed in the hands of her attorney to be delivered to her executors, which deed reserved a life estate in the land conveyed and provided that the same be held in trust by the executors after her death for the benefit of her minor foster daughter until the latter reached the age of twenty-one, when it was to be delivered to her as a conveyance of the fee, the deed conveyed to the daughter no present interest, and therefore the taxes assessed on the lands during the decedent's life were chargeable against the residuary estate therein. *Nation v. Green, Exr.*, 697, 704, 706 (5).

**EXEMPTIONS—**

See also **EXECUTION 1.**

1. *Claiming After Sale on Execution.*—An execution debtor may, after he has sold property subject to lien of an execution, include it in his schedule and claim it as exempt. *Luckett v. Hammond*, 484, 489 (4).
2. *Claim of, by Purchaser from Execution Debtor.*—The purchaser of real estate from an execution debtor, if such debtor was not the owner of property of value in excess of \$600 at the time of the purchase, may claim the property as exempt or maintain an action before the execution sale either to quiet title as against the execution lien or to enjoin such sale. *Luckett v. Hammond*, 484, 489 (5).

**EXPERTS—**

See **APPEAL 2**; **EVIDENCE 2-4, 8, 9.**

**FALSE CLAIMS—**

Presenting, prosecution, evidence, see **CRIMINAL LAW 27.**

**FALSE PRETENSES—**

See **CONSPIRACY 11.**

**FINDINGS—**

See **TRIAL 4, 5.**

**FRAUD—**

See also **FRAUDULENT CONVEYANCES.**

1. *Complaint.—Fraudulent Release Contract.—Elements of Cause.*—The essential elements of a cause of action for damages based on the fraudulent procurement of a settlement of a claim for personal injuries are representations, falsity, scienter, deception and injury. *Rochester Bridge Co. v. McNeill*, 482, 489 (7).
2. *Liability for Representations.—“Actionable Fraud.”*—A party who makes an untrue representation as to a material fact, not knowing whether it is true or untrue, though he believes it to be true, with the intention that another shall act upon it, and such other does act thereon to his injury, is guilty of “actionable fraud.” *Rochester Bridge Co. v. McNeill*, 482, 489 (8).

**FRAUD—Continued.**

3. *Measure of Damages.—Settlement for Injury.—Instructions.*—The measure of damages for a fraudulent procurement of a settlement of a claim for personal injuries is the amount to which the plaintiff was entitled under all the circumstances on the day of the trial, less any amount received at such time; hence an instruction proceeding upon the theory of an award as of the date of the trial was erroneous.  
*Rochester Bridge Co. v. McNeill*, 432, 440, 442 (9).
4. *Nominal Damages.*—Where one procures a contract by fraud, the defrauded party may recover at least nominal damages.  
*Rochester Bridge Co. v. McNeill*, 432, 438 (3).
5. *Pleading.—Opinions.*—A statement, though based on the expression of an opinion, may amount to actionable fraud, if it is a mere contrivance of fraud, or if the person to whom it was expressed has justly relied on it and has been misled, or when it is coupled with other circumstances.  
*Rochester Bridge Co. v. McNeill*, 432, 436 (2).
6. *Settlement of Claim.—Complaint.—Validity of Claim.*—A complaint for substantial damages caused the plaintiff by the defendant's fraud in procuring a contract of settlement for personal injuries, to warrant a recovery of such damages, must show not only the fraud but also a valid claim against the defendant for the original injury.  
*Rochester Bridge Co. v. McNeill*, 432, 439 (5).
7. *Settlement for Personal Injuries.—Effect on Right of Action.*—Though an unrescinded contract for settlement of damages for personal injuries precludes a recovery for negligence causing the injury, it does not preclude an action for fraud whereby the settlement was brought about.  
*Rochester Bridge Co. v. McNeill*, 432, 436, (1).

**FRAUDS, STATUTE OF—**

See **BROKERS 2.**

**FRAUDULENT CONVEYANCES—**

1. *Bulk Sales.—Statute.—Claims Affected.*—Under the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, neither secured claims, nor claims disputed and in litigation, are excepted from the operation of the statute.  
*George Kraft Co. v. Heller*, 612, 618 (3).
2. *Bulk Sales.—Fraudulent Intent.*—Under the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, the question as to whether a fraudulent intent in fact existed and entered into a transfer of merchandise in bulk is not material; if it is found as a fact that the purchaser in such transaction complied with the act, the court can say as a matter of law that there was no intent to defraud the creditors of the seller; but if the purchaser failed to comply with the act, the court is required to say as a matter of law that the transaction was tainted with a fraudulent intent.  
*George Kraft Co. v. Heller*, 612, 614 (1).
3. *Bulk Sales.—Failure to Give Notice.—Fraud per se.*—The failure of the purchaser of a stock of goods to give notice required by the Bulk Sales Act, §7471a *et seq.* Burns 1914, Acts 1909 p. 122, renders the transaction fraudulent *per se* as to the seller's creditors, regardless of the actual good faith of the

**FRAUDULENT CONVEYANCES—Continued.**

parties or of the compliance with the other provisions of the act; and this is true even though it appears that a compliance with the provisions of the act would have been of no benefit to a complaining creditor, no reference to his claim having been made on the list of creditors.

*George Kraft Co. v. Heller*, 612, 616 (2).

**FREIGHT—**

Carriage, damages, see **CARRIERS** 6-8, 18-21.

**GRAND JURY—**

See also **CRIMINAL LAW** 14, 20, 48.

1. *Presence of Special Prosecutor.*—In view of §1980 Burns 1914, Acts 1905 p. 584, §109, requiring prosecuting attorneys to appear before the grand jury, and §9406 Burns 1914, §5864 R. S. 1881, requiring them to conduct prosecutions for felonies, the presence of a specially appointed prosecuting attorney at deliberations of the grand jury and his insistence that the defendant be indicted on the testimony was unauthorized, as there must be no opportunity for the improper influence upon the grand jury after the investigation is closed, and was therefore a good ground of abatement.

*Williams v. State*, 283, 302, 303 (20).

2. *Grand Jury.—Irregular Organization.—Calling Bystander.—Plea in Abatement.*—Where a member of the grand jury regularly called was excused and a substitute member, at the direction of the court, was called by the sheriff from the bystanders and sworn as a member of the jury, the jury thus organized was irregular and could not return an indictment which could stand when properly attacked; and a plea in abatement stating such facts, and disclosing that the defendant had not by conduct or omission waived the defect, should have been sustained.

*Smith v. State*, 501, 502 (1).

**GUARDIAN AND WARD—**

Liens on land, power of guardian to create, see **DOWER** 1.

*Appointment.—Nomination by Will.*—A guardian nominated by will is entitled, under §3066 Burns 1914, §2519 R. S. 1881, to appointment over all others, but his appointment, duties and powers are governed by the law regulating guardians not so nominated.

*Nation v. Green, Exr.*, 697, 710 (10).

**HARMLESS ERROR—**

See **APPEAL** 31-43.

**HEARSAY—**

See **EVIDENCE** 7.

**HIGHWAYS—**

See also **EMINENT DOMAIN** 2; **STATUTES** 5, 8.

1. *Highway Commission.—Nature.*—By the creation of a state highway commission, the State Highway Act (Acts 1917 p. 253) does not establish a new department of government, the commission being an administrative body intrusted with the

## HIGHWAYS—Continued.

- application and administration of the act under which it is appointed. *Wright v. House*, 247, 262 (20).
2. *Improvement.—Appeal to Circuit Court.—Jurisdiction.*—On appeal to the circuit court in a highway proceeding, only such issues as were tried before the board of commissioners can be tried in the circuit court; hence a conclusion of law upon a matter that was not before the commissioner is of no force. *Whitesell v. Metsker*, 1, 6, 7 (5).
  3. *Improvement.—Constitutional Law.—Due Process.*—“*Due Course of Law.*”—*General Tax.*—Since the funds provided for under the State Highway Act (Acts 1917 p. 253) for the improvement of highways arise from an exercise of the general taxing power, and not from special assessments, the question of actual benefits to property affected is not involved and property owners are not entitled to a notice and hearing on that question, “due process” under the fourteenth amendment to the federal Constitution, or “due course of law” under Art. 1, §12, of the state Constitution, requiring only such procedure as is suited and adapted to the levy and collection of general taxes. *Wright v. House*, 247, 256, 257 (9).
  4. *Improvement.—Power of Commissioners.*—Though the commissioners on recommendation may not order an entirely different character of road from that petitioned for, they may, within the bounds of fair judgment and engineering needs, if the petition is granted, order that the road shall be constructed according to approved methods. *Whitesell v. Metsker*, 1, 11 (8).
  5. *Improvement Proceedings.—Qualification of Commissioner.—Challenge.—Appeal.*—Where, in a highway proceeding, the board of commissioners made no finding on a challenge of a member of the board for disqualification, but received his vote and unanimously affirmed the viewers’ report, they either overruled the challenge or declined to act thereon, and in either case an issue was made thereon and a right created that was presentable on appeal to the circuit court. *Whitesell v. Metsker*, 1, 5 (3).
  6. *Improvements.—Viewers’ Supplemental Report.—Presumption.*—Where the viewers’ report in a highway proceeding stood for three months without action, and no objections were made, it will be presumed that there was no occasion for the filing of a supplemental report as required under §7718 Burns 1914, Acts 1905 p. 521. *Whitesell v. Metsker*, 1, 12 (9).
  7. *Improvement Proceedings.—Objections.—Burden of Proof.*—In a highway proceeding, under §7713 *et seq.* Burns 1914, Acts 1905 p. 521, parties objecting to the jurisdiction of the board of commissioners had the burden of proving facts showing its lack of power to proceed. *Whitesell v. Metsker*, 1, 13 (10).
  8. *Petition for Improvement.—Viewers’ Report.—Variance.*—Where the petition for the improvement of a highway, under §7713 Burns 1914, Acts 1905 p. 521, recommended a pavement of broken stone, combined and held together with a durable binder, a recommendation of the viewers, on advice of the engineer, of cement as a binder was within the statute, since the statute is silent as to the binding material, and, under §7717 Burns 1914, Acts 1905 p. 521, the commissioners had

**HIGHWAYS—Continued.**

power to approve the viewers' report if they deemed the changes essential to proper construction.

*Whitesell v. Metsker*, 1, 7, 9, 10 (6).

9. *Proceedings for Improvement.—Disqualification of Commissioner.—Subsequent Appeals.—Law of the Case.*—Where the Supreme Court, in an appeal in a highway proceeding, held that the trial court erred in failing to consider a proper challenge of the competency of a commissioner and stated the rule of law that a commissioner, though disqualified, may be compelled to vote where his refusal to do so "would effectually bar any remedy," in a subsequent appeal therein, where the findings showed that, though one of the commissioners was disqualified at the time of the first appeal and remained so, his associate commissioners disagreed on the approval of the viewers' report, such rule was the law of the case and validated the vote of such commissioner on the approval order, his vote on other questions depending upon the particular circumstances.

*Whitesell v. Metsker*, 1, 4 (2).

10. *Power to Construct.—Nature of Function.—General Tax.—Legislative Power.*—Since the power to construct and maintain public highways, like the power to construct and maintain the state institutions, is a governmental function, the legislature may provide for their establishment and maintenance by a general tax, or empower any of the governmental subdivisions of the state to levy and collect taxes for that purpose in the exercise of delegated governmental powers.

*Wright v. House*, 247, 257 (10).

11. *Use of Automobiles.—Care.—Dangerous Instrument.*—An automobile is not a "dangerous instrument," and the legal rules are applicable to it in the same manner as to other vehicles.

*Martin v. Lilly*, 139, 143 (2).

12. *Use of Road.—Duty of Automobile Driver.—Jury Question.*—The driver of an automobile is required to use the care that an ordinarily prudent person would exercise under like circumstances, and whether he must keep a constant lookout for pedestrians and for other vehicles under given circumstances is for the jury to determine.

*Martin v. Lilly*, 139, 144 (3).

**HOMICIDE—**

See also CRIMINAL LAW; WITNESSES 3.

1. *Appeal.—Defective Indictment.*—One who is charged with assault and battery with intent to commit murder, and who is convicted of assault and battery only, cannot justly complain that the indictment does not sufficiently charge the felonious intent to murder.

*Bennett v. State*, 380, 382 (2).

2. *Appeal.—Harmless Error.—Reputation.*—In a prosecution for murder, the admission of testimony as to the defendant's reputation, and particularly that by the defendant's daughter that she, up to the tenth year of her life, knew nothing about her father, if error, was harmless, where there is no showing that any objection was made or exception saved to the admission thereof, and in view of other evidence of a conversation between the defendant and the chief of police, wherein the defendant made the statement, which was not disputed, that he had been in the workhouse for horse stealing.

*Berry v. State*, 102, 112 (6).

**HOMICIDE—Continued.**

3. *Manslaughter.—Proximate Cause.*—In a prosecution for manslaughter, based on a violation of the Motor Vehicle Act (§10476 Burns 1914, Acts 1913 p. 779, §16), evidence showing that the accused, while on a motorcycle, ran into and killed a two-year-old child, who suddenly started across the street and stopped in front of the motorcycle, but which failed to show that such violation was the proximate cause of the death and, when considered as a whole, showed at most only negligence on the part of the accused is insufficient to support a conviction.  
*Dunville v. State*, 373, 379 (4).
4. *Manslaughter.—Wanton Recklessness.—Intent.*—Where one acts in violation of a statute under circumstances showing reckless disregard for the life and limb of others, and this violation is the proximate cause of the death of another, the law implies an intent to commit involuntary manslaughter.  
*Dunville v. State*, 373, 375 (3).
5. *Manslaughter.—Wanton Recklessness.—“Unlawful Act.”—Proximate Cause.—Evidence.*—The words “unlawful act” contained in the statutory definition of manslaughter (§2239 Burns 1914, Acts 1905 p. 584, §351) are as broad in their content as they were at common law, and therefore include not only acts prohibited by statute but also conduct involving such wilfulness as to show a wanton recklessness as to the life and limb of others; but in either case, to support a conviction for manslaughter, the evidence must show that the unlawful act was the proximate cause of the death.  
*Dunville v. State*, 373, 375 (2).
6. *Weapon.—Identification.—Weight of Evidence.*—In a prosecution for murder, a hatchet found near the scene of the crime, although not discovered until several months after the offense was committed, was properly exhibited to the jury, where the evidence tended to show that the wounds inflicted on the deceased were such as could have been made by the hatchet; that nobody in the neighborhood had ever had such a hatchet; that it was found in the natural direction for the guilty party to go; that it was in such position that it might be inferred that it was not left there accidentally; and that it appeared to be new, but had a peculiar brown color on the edge; its identity having also been established by witnesses whose testimony traced it from the place of discovery into the hands of the prosecution, since the objection to such exhibit went to the question of the weight of the evidence.  
*Berry v. State*, 102, 110, 111 (5).

**HUSBAND AND WIFE—**

See also **DIVORCE; DOWER.**

1. *Disabilities.—Suretyship.*—Where the wife simply pledges her property to be used or returned or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate.  
*Citizens' Bank, etc. v. Opperman*, 212, 221 (13).
2. *Disabilities.—Wife as Surety.*—Where it appears that the wife has absolutely and completely parted with title to property by an executed agreement, and that nothing remains contingent upon the husband's payment of his debts, her convey-



**HUSBAND AND WIFE—Continued.**

ance or assignment of property is binding upon her, though the purpose was the actual payment of the husband's debt.

*Citizens' Bank, etc. v. Opperman*, 212, 221 (12).

3. *Disabilities of Wife.—Surety for Husband.—Burden of Proof.*—The receipt of the property of a married woman as a pledge for her husband's debt creates a relation of suretyship on her part which is binding on the pledgee, unless the latter shows that she is estopped to assert such suretyship; hence, in an action against the pledgee to recover such property, she need show nothing in the first instance as to the defendant's knowledge of such suretyship.

*Citizens' Bank, etc. v. Opperman*, 212, 217 (6).

4. *Insanity.—Change of Tenancy.—Statute.*—The right of action under §§4004, 4005 Burns 1914, Acts 1899 p. 109, to convert an estate by entireties held by a husband and wife into a tenancy in common when one of such tenants has been adjudged insane, does not survive the death of the insane tenant, since the entire estate on the latter's death vests immediately in the survivor.

*Kilgore v. Templer*, 675, 681 (3).

5. *Insanity.—Effect on Lands Held as Tenants by Entireties.*—Section 4005 Burns 1914, Acts 1899 p. 109, providing that, where a husband and wife own land as tenants by the entireties or as joint tenants, and one of them is adjudged insane, they become tenants in common, does not *ipso facto* create a tenancy in common on such adjudication of insanity, since such section, when construed with §4005, contemplates that after the adjudication of insanity an action shall be brought by one of the parties authorized by the statute, in which there shall be pleaded and proved the names of the tenants, the nature of the tenancy, the description of the realty affected, that one of such tenants has been adjudged insane by a court of competent jurisdiction and that the insanity is probably permanent, after which it is the duty of the court to enter a decree changing the tenancy to a tenancy in common.

*Kilgore v. State, ex rel.*, 675, 679 (1).

6. *Suretyship of Wife.—Constructive Notice.—Facts Putting on Inquiry.*—In an action by a married woman to recover her property on the ground that she allowed it to be pledged by her husband for his debt, the law does not require that the defendant have actual knowledge of the wife's suretyship in order to bar the defense of estoppel, since, if the circumstances were sufficient to put the defendant upon inquiry and the latter failed to inquire, as a reasonably prudent person would have inquired, knowledge is imputed of all the facts that inquiry would have disclosed.

*Citizens' Bank, etc. v. Opperman*, 212, 218 (7).

**IMPEACHMENT—**

See WITNESSES.

**INDEPENDENT CONTRACTORS—**

See BRIDGES 2; NEGLIGENCE 11.

**INDICTMENT AND INFORMATION—**

See also BANKS AND BANKING 1, 2; CONSPIRACY 4-14; CRIMINAL LAW; GRAND JURY; INTOXICATING LIQUORS 1-3.

## INDICTMENT AND INFORMATION—Continued.

1. *Arson.—Value of Structure.—Surplusage.—Fine.*—In a prosecution for arson, under §2260 Burns 1914, Acts 1905 p. 584, §371, the fine may be double the value of the structure burned, subject to Art. 1, §16, of the state Constitution, prohibiting excessive fines; hence, an allegation in an indictment fixing the damage to the structure burned at \$500 is surplusage, it being sufficient to show that some burning was done.  
*O'Daniel v. State*, 477, 481 (5).
2. *Assault and Battery with Intent.—Motion to Quash.*—A motion to quash an indictment for assault and battery with intent to commit murder, when directed to the whole indictment, should be overruled where the assault and battery is sufficiently charged.  
*Bennett v. State*, 380, 381 (1).
3. *Charging Statutory Offense.—Sufficiency.*—An indictment based on a statute must, with certainty and precision, charge the defendant with having committed or omitted the acts, under the circumstances, and with the intent, mentioned in the statute.  
*Hinshaw v. State*, 447, 453 (4).
4. *Certainty.*—Where an offense is pleaded with such identity or certainty that the accused is enabled to plead his conviction or acquittal in bar of another prosecution therefor, the rule requiring particularity in charging the offense is satisfied.  
*Williams v. State*, 283, 294 (7).
5. *Certainty.—Use of Disjunctives.*—The rule that it is sufficient in criminal pleadings to charge the crime in the language of the statute does not mean that, where several acts connected by disjunctives are stated in a statute, the disjunctives may be used in charging the offense, since their use would render the pleadings uncertain; hence in charging a violation of that part of §4 of the Prohibition Act, Acts 1917 p. 15, making it unlawful "to keep intoxicating liquor with the intent to sell, \* \* \* furnish or otherwise dispose of the same," it is proper to charge conjunctively that one did unlawfully keep with "intent to sell \* \* \* furnish and otherwise dispose of the same."  
*State v. Sarlin*, 359, 362 (4).
6. *Conspiracy to Commit Felony.—Certainty.*—An indictment for conspiracy to commit a felony which is sufficient to enable the court and the jury to understand distinctly the issue to be tried, and to fully inform the defendant of the nature of the offense charged, and upon which a judgment may be pronounced on a conviction according to the rights of the case, is sufficient as against a motion to quash for uncertainty.  
*Williams v. State*, 283, 297 (14).
7. *Conspiracy.—Duplicity.*—An indictment, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, for conspiracy to solicit bribes is not bad for duplicity, though it charged that solicitations were to be made upon many persons who were engaged in various illegal businesses so classified as to bring them within the prohibition of statutes pertaining to specifically defined crimes.  
*Williams v. State*, 283, 297 (13).
8. *Conspiracy.—Soliciting Bribes.*—A deputy prosecuting attorney and certain officers of a city charged with official duties pertaining to the enforcement of the criminal laws of the state may be jointly indicted under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, for conspiracy to solicit bribes, and they need not be charged and tried singly under the brib-

## INDICTMENT AND INFORMATION—Continued.

ery statute, for, though each of such officers performed a different duty, they controlled the criminal procedure required to bring violators of the law before the courts.

*Williams v. State*, 283, 294 (9).

9. *Conspiracy.—Soliciting Bribes.—Failure to State Names.*—In a prosecution for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, the statement in the indictment of the fact that the names of the persons solicited or to be solicited are unknown is sufficient excuse for failing to name such persons. *Williams v. State*, 283, 294 (8).

10. *Conspiracy.—Soliciting Bribes.—Names of Persons Solicited.*—In a prosecution of public officers for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, if the names of the persons to be solicited were known, or if they were reasonably ascertainable by the grand jury, they should have been pleaded. *Williams v. State*, 283, 293 (6).

11. *Constitutional Law.—Pleading.*—Chapter 62, Acts 1915 p. 123, requiring that recitals, etc., in all criminal and civil pleadings shall be considered as allegations of fact, etc., is void so far as it applies to indictments, in view of Art. 1, §13, of the Constitution. *Hinshaw v. State*, 147, 153 (7).

12. *Different Felonies of Same Class.—How Charged.*—Felonies of the same class should be charged in separate counts of an indictment. *Hinshaw v. State*, 447, 455 (7).

13. *Description of Money.—Sufficiency.*—In a prosecution of a bank official for a violation of §2295 Burns 1914, Acts 1905 p. 584, the description of money called for in a check described in the indictment as "Three Thousand (\$3,000) Dollars lawful and current money of the United States," was sufficient, in view of §2058 Burns 1914, Acts 1905 p. 584.

*Hinshaw v. State*, 447, 455 (5).

14. *Election Between Counts.—Discretion of Court.*—Whether prosecution should be required to elect between different counts of an indictment is largely within the court's discretion; and when it is not apparent on the face of an indictment that different and distinct offenses, which cannot be properly joined, are charged, election need not be required.

*Hinshaw v. State*, 447, 456 (9).

15. *Intoxicating Liquors.—Affidavit.—Surplusage.*—Where the charge in an affidavit, under §4, Acts 1917 p. 15, for unlawfully keeping intoxicating liquor with intent to sell, etc., ended with the words "or otherwise disposed of or use," the affidavit was properly quashed under §2065, cl. 3, Burns 1914, Acts 1905 p. 584, §194, since the word *use* therein tended to show innocence, was neither in apposition to, nor explanatory of, that which preceded it, and therefore cannot be treated as surplusage.

*State v. Sarlin*, 359, 363 (5).

16. *Joinder of Cognate Offenses.—Rule.*—Any number of counts charging the same transaction as constituting different offenses may be joined, if the offenses are cognate or of the same nature, and the mode of trial is the same.

*Hinshaw v. State*, 447, 456 (10).

17. *Motion to Quash.—Defects Appearing on Face of Indictment.*—Under the Criminal Code, defects not appearing on the face of an indictment cannot be raised by a motion to quash; and, though such defects do so appear, if the offense is charged

## INDICTMENT AND INFORMATION—Continued.

- with such a degree of certainty that the defects do not tend to prejudice the substantial rights of the defendant, they must be disregarded. *Williams v. State*, 283, 288, 291 (2).
18. *Motions to Make More Specific.*—Motions requiring the state to make indictments or affidavits more specific, and to state facts necessary to sustain conclusions or recitals, are not recognized by the Criminal Code. *Hinshaw v. State*, 447, 455 (6).
19. *Negating Exceptions.*—Where exceptions are in a subsequent section of the statute, or in a proviso of the same section, they need not be negated. *Jenkins v. State*, 510, 511 (2).
20. *Pleading Provisos and Exceptions.*—Where an exception is in a proviso, or in a subsequent section of the statute, it need not be pleaded; but exceptions which are a part of the definition of the offense must be pleaded. *State v. Sarlin*, 359, 362 (2).
21. *Several Counts Based on Same Felony.—Election.*—Where several counts of an indictment based on the same alleged felony are inserted to avoid the consequences of a possible variance, it is not error to overrule a motion requiring the prosecution to elect. *Hinshaw v. State*, 447, 456 (8).
22. *Solicitation of Bribes.—Names of Persons Solicited.*—An indictment of public officers for conspiracy to solicit bribes, under §§2647, 2378 Burns 1914, Acts 1905 p. 584, §§641, 477, containing the statement that a specified sum was actually paid to the conspirators, was not fatally defective for failing to state the names of the contributors, in view of another allegation therein that the conspiracy was formed to solicit bribes not only from persons engaged in illegal business, but from those who might thereafter engage in such business and for the further reason that the allegation of the receipt of the specified sum does not necessarily show that the grand jurors knew the names of the contributors or that the evidence before them on that subject was satisfactory. *Williams v. State*, 283, 293 (4).
23. *Sufficiency.*—An indictment charging an offense with such degree of certainty that the court can pronounce judgment thereon according to the right of the case is sufficient. *Hinshaw v. State*, 447, 453 (3).
24. *Sufficiency.—Pleading Facts.—Intoxicating Liquors.*—An affidavit, under §8351 Burns 1914, Acts 1907 p. 689, which contains in plain and concise language, without unnecessary repetition, a statement of the ultimate facts that the state must prove, is sufficient, as the state is not required to plead the evidence supporting such facts. *Scherer v. State*, 14, 17 (3).
25. *Sufficiency.—Pleading.—Conclusions.—Intoxicating Liquors.*—Under §8351 Burns 1914, Acts 1907 p. 689, an affidavit charging an offense substantially in the language of the statute is sufficient as against a motion to make the affidavit more specific, notwithstanding the provisions of Acts 1915, ch. 62, p. 123. *Scherer v. State*, 14, 17 (4).
26. *Sufficiency.—Keeping Place for Unlawful Sale of Intoxicating Liquor.—Surplusage.*—In a prosecution under §8351 Burns 1914, Acts 1907 p. 689, a motion to quash the affidavit because it contained a recital that the building was not licensed, and therefore did not specifically show that the defendant was not licensed, was properly overruled, where, by eliminating such

## INDICTMENT AND INFORMATION—Continued.

recital, an offense was charged substantially in the language of the statute, since there could be no doubt as to the crime charged, the recital being meaningless surplusage in view of the fact that no law provides for licensing a building for the sale of intoxicating liquors. *Scherer v. State*, 14, 16 (1).

27. *Use of Disjunctives.—Uncertainty.*—An indictment for the unlawful possession of intoxicating liquors, as defined by the Prohibition Act, §8356d Burns' Supp. 1918, Acts 1917 p. 15, alleging more than one of the purposes made illegal by the statute, and connecting them by the disjunctive "or" instead of the conjunctive "and," is defective for uncertainty.

*Young v. State*, 505.

28. *Venue.—Sufficiency.*—The omission of the name of the state from the body of an indictment does not render the pleading fatally defective where the name thereof appears in the caption, since the caption is part of the pleading.

*Koehler v. State*, 387, 388 (1).

## INFERENCES—

See ARSON 3; CONSPIRACY 8; CRIMINAL LAW 30; PLEADING 5.

## INHERITANCE—

Tax, liability of residuary estate, see EXECUTORS AND ADMINISTRATORS 3, 4.

## INJUNCTION—

De facto officer, right to injunctive relief against claimant, see OFFICERS 1, 3.

## INJURIES—

See BRIDGES; DAMAGES; MASTER AND SERVANT; RAILROADS 4-6.

To real estate, permanent, damages, see ACTION 3.

Fraudulent settlement of claim, action, elements of damage, see FRAUD 1.

## INSANE PERSONS—

Sale of insane husband's lands, effect on wife's inchoate interest, see DOWER.

*Scope of Proceedings.—Statute.*—A proceeding under §3101 et seq. Burns 1914, Acts 1895 p. 205, is limited to the investigation of the mental status of the person alleged to be of unsound mind and to the making of such orders as are authorized in such statute; hence, where a person adjudged to be insane is married and the owner of land under a joint tenancy or a tenancy by the entireties, the judgment rendered could not have the effect of changing the tenancy to a tenancy in common by virtue of §§4004, 4005 Burns 1914, Acts 1899 p. 109, even though the findings show that the insanity is probably permanent; and this would be true regardless of the party instituting the insanity proceeding. *Kilgore v. Templer*, 675, 680 (2).

## INSTRUCTIONS—

See TRIAL.

Review of, see APPEAL 15, 27, 28, 32-35; CRIMINAL LAW 73, 81, 99, 101, 103.

**INSURANCE—**

As motive for arson, see ARSON 2.

1. *Action on Policy by Assignee.—Complaint.—Sufficiency.*—In an action on a life insurance policy by an assignee, who has paid premiums, which policy gave the insurer the right to treat it as void on its assignment, a complaint alleging the assignment and making the policy an exhibit does not state a cause of action in the absence of allegations showing that the insurer has waived, or is estopped from asserting, such right.

*Prudential Ins. Co. v. Ritchey*, 157, 161 (5).

2. *Life Insurance.—“Facility Payment Clause.”—Rights of One Paying Premiums.*—Payment of premiums on the life insurance policy of another gives the person so paying them no rights to enforce, under a “facility payment” clause in the policy, the payment of death benefits, since the payment of the premiums, in legal contemplation, was made by the insured.

*Prudential Ins. Co. v. Ritchey*, 157, 160 (2).

3. *Life Insurance.—Beneficiaries.—Rights under “Facility Payment” Clause.—Action.*—Where death benefits of a life insurance policy were payable to the personal representative of the insured, unless settlement should be made under a “facility payment” clause empowering the company to pay such benefits to any relative by blood or marriage, or to any person appearing to the company to be equitably entitled thereto by reason of having incurred expense, etc., an action cannot be maintained to enforce payment by one with whom the company might have settled, at its option, under such facility clause, where such person is neither named as a beneficiary nor otherwise designated as the person entitled to recover.

*Prudential Ins. Co. v. Ritchey*, 157, 159 (1).

4. *Parol Assignment of Policy.—Validity.*—The parol assignment of an insurance policy is valid, unless forbidden by provision in the policy. *Prudential Ins. Co. v. Ritchey*, 157, 160 (3).

**INTENT—**

Proof, review, see CRIMINAL LAW 110.

When implied, see ASSAULT AND BATTERY 2; HOMICIDE 4.

Materiality, under Bulk Sales Act, see FRAUDULENT CONVEYANCES 2.

**INTERROGATORIES—**

See TRIAL 8, 9.

Answers, review, see APPEAL 25; LIBEL AND SLANDER 12, 13.

**INTERSTATE COMMERCE—**

Intereference, statute, effect of federal decision, see STATES 2.

**INTOXICATING LIQUORS—**

Illegal sale, sufficiency of charge, see CRIMINAL LAW 12; INDICTMENT AND INFORMATION 15, 24, 26.

Evidence, admissibility, see CRIMINAL LAW 32, 33.

1. *Affidavit.—Negating Exceptions.*—An affidavit charging the defendant with having intoxicating liquors in his possession with intent to sell, etc., in violation of Acts 1917, ch. 4, p. 15, §4, is not insufficient because it fails to negative the exceptions,

## INTOXICATING LIQUORS—Continued.

- the exceptions in the statute not being a part of the definition of the offense. *Jenkins v. State*, 510, 511 (1).
2. *Charging Offense.—Exceptions.*—The charge that the defendant on a certain date, in a named city and county of the state, did then and there unlawfully keep intoxicating liquor, to wit, whisky, gin, wine and beer with intent to sell, barter, exchange, give away, furnish and otherwise dispose of the same to persons to the affiant unknown sufficiently charged an offense, under the Prohibition Act, Acts 1917 p. 15, §4, though it did not negative the exception in the proviso.  
*James v. State*, 579, 581 (1).
  3. *Indictment.—Sufficiency.—Negating Defenses.*—In charging the offense of keeping, running and operating a place for the sale of intoxicating liquors in violation of §8351 Burns 1914, Acts 1907 p. 689, it is not necessary to negative the provisos in the statute.  
*Scherer v. State*, 14, 16 (2).
  4. *Evidence.—Sufficiency to Show Intent.*—The evidence is reviewed and held sufficient to show that the defendant was the owner of intoxicating liquor and that he had it with the intent to dispose of it unlawfully as charged.  
*Jenkins v. State*, 510, 512 (4).
  5. *Failure to Remove From State.*—An affidavit charging a failure to remove intoxicating liquors from the state within ten days after the enactment of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns 1914, does not charge a public offense, since the statute does not provide a penalty for the failure to remove it.  
*Blomberg v. State*, 619.
  6. *Illegal Sale.—Sufficiency of Evidence.*—In a prosecution for the illegal sale of intoxicating liquors, under §8356d Burns' Supp. 1914, Acts 1917 p. 15, the evidence, though circumstantial, is held sufficient to show that the defendant unlawfully kept, and was making unlawful sales of, intoxicating liquors as charged, in view of the rule that a verdict supported by some evidence is supported by sufficient evidence.  
*Schulmeyer v. State*, 463, 466 (2).
  7. *Keeping Place.—Appeal.—Sufficiency of Evidence.*—On appeal from a judgment of conviction for the violation of the Prohibition Act, Acts 1917 p. 15, the evidence is reviewed and held sufficient to sustain the verdict, under the rule that the judgment will be upheld unless there is a total lack of evidence on an essential element of the offense.  
*Barker v. State*, 493, 496 (4).
  8. *Keeping with Intent to Sell.—Construction of Statute.—Bonded Liquor.*—Section 4 of Acts 1917 p. 15, §8356d Burns' Supp. 1918, prohibiting the keeping of intoxicating liquor with intent to sell, etc., is not intended to apply to only those having bonded liquor, but is general in its application.  
*State v. Sarlin*, 359, 361 (1).
  9. *Keeping Place.—Nuisance.—Charging Offense.—Excluding Home.*—In charging the illegal sale, barter, etc., of intoxicating liquors under §4, Acts 1917 p. 15, or the maintenance of a place for such illegal purposes, defined as a nuisance by §20 of the act, it was not necessary to exclude the home of the accused, on the theory that he had the right to keep intoxicating liquor there and to serve it to guests, since the act does not

**INTOXICATING LIQUORS—Continued.**

authorize the keeping of the liquor in the home for sale, barter, exchange, or to be otherwise disposed of contrary to law.

*James v. State*, 579, 581 (2).

10. *Statute.—Construction.—“Furnish.”*—Where the accused, pursuant to an agreement with his son-in-law, purchased intoxicating liquor to be used by them and their families on a future day, the son-in-law furnishing half of the money at the time of making the agreement, the court, in determining whether the accused was guilty of an intent to “furnish” the liquor in violation of §4, Acts 1917 p. 15, will consider the word “furnish” in the concrete as used in the act, rather than in the abstract, keeping in mind the general purpose of the act and the evils intended to be remedied. *Banks v. State*, 353, 356 (2).

11. *Unlawful Keeping.—“Furnish.”—Statute.*—Where the accused had in his possession intoxicating liquor which he purchased pursuant to, and with intent to carry out, an agreement with his son-in-law under which the liquor was to be used by them and their families on a future day, the son-in-law having furnished half of the purchase price at the time of making the agreement, he was guilty of keeping intoxicating liquor with intent to “furnish,” etc., in violation of Acts 1917 p. 15, though the son-in-law had title to half of the liquor from the time of the purchase. *Banks v. State*, 353, 358 (3).

**JOINDER—**

Of cognate offenses, rule, see **INDICTMENT AND INFORMATION** 16.

**JOINT LIABILITIES—**

See **LIBEL AND SLANDER** 5, 6; **TORTS**.

**JUDGES—**

See also **COURTS**.

Change of, see **APPEAL** 18.

1. *Change of.—Discovery of Prejudice.—Rules of Court.*—Where there is a showing that the facts as to the bias and prejudice of the judge are not discovered until the day on which the motion for change is filed, a rule of court that an application for change of judge shall be made at least a specified number of days prior to a certain stage of the proceedings has no force. *Stidham v. Sterrett*, 507, 509 (2).
2. *Change of.—Time for Filing Motion.*—Where, in a drainage proceeding, the court had heard argument on the first ground of remonstrance—that the report of the drainage commissioners was not according to law—and had ordered it referred to the commissioners for correction, a proper motion for change of judge, filed before the beginning of the trial on the other issues, was timely, and should have been granted, as there had been no submission of a question of fact such as is involved in the trial of an issue made. *Stidham v. Sterrett*, 507, 508 (1).

**JUDGMENT—**

Review of, see **APPEAL**; **CRIMINAL LAW**.

For judgments in particular actions or proceedings, see also the various specific topics.

**VOL. 188—50**



**JUDGMENT—Continued.**

1. *Basis.—Determination From Pleadings.—Execution.*—Where, in a suit to set aside an execution sale, one paragraph of complaint asked that the judgment be set aside for fraud and the other proceeded on the theory that the property was exempt from execution, a judgment that the sale and the sheriff's certificate and deed be set aside, without cancellation of the judgment on which the execution issued, indicates that the relief was granted under the latter paragraph.  
*Luckett v. Hammond*, 484, 487 (1).
2. *Collateral Attack.*—Where a judgment of a court having general jurisdiction of the subject-matter is fair on its face, it is entitled to full faith and credit by courts of co-ordinate jurisdiction in the same state until set aside by appeal or by direct proceeding.  
*Steenburg v. Kyle*, 26, 29 (3).
3. *Nuisance.—Damages.—Continuing Abatable Nuisance.*—For a continuing abatable nuisance, damages may be recovered only to the date of the action, as there is a presumption that the cause producing the damage will be removed by an abatement of such nuisance; but if the nuisance is not abated, successive actions may be maintained so long as it is permitted to continue, in any one of which damages may be recovered for injuries occasioned prior to the commencement of the action and within the statute of limitations, not extending back of a former recovery.  
*Indiana Pipe Line Co. v. Christensen*, 400, 403 (1).
4. *Trial.—Motions for Venire de Novo and in Arrest.—Distinction.*—While a motion for a *venire de novo* and a motion in arrest of judgment must both be made before judgment, the former should precede the motion for new trial and is confined to uncertainty, ambiguity or imperfections in the verdict or findings, while the latter challenges the pleadings upon which the verdict or finding rests and cuts off the right to subsequently file a motion for new trial.  
*Phillips v. Gammon*, 497, 499 (3).

**JUDICIAL KNOWLEDGE—**

See CRIMINAL LAW 47.

**JUDICIAL POWER—**

See CONSTITUTIONAL LAW 7, 17.

**JUDICIAL SALES—**

Lands of insane husband, effect as to wife's inchoate interest, see DOWER 2, 3.

**JURISDICTION—**

See COURTS 3.

**JURY—**

Province of, see TRIAL 11.

Questions for, see APPEAL 26; CONSPIRACY 2; CRIMINAL LAW 50, 54; MASTER AND SERVANT 4; NEGLIGENCE 3, 5, 9; RAILROADS 2.

*Examination.—Discretion.*—The examination of jurors on the *voir dire* to determine whether peremptory challenge shall be used is largely in the discretion of the trial court, and is limited by the good faith of the examining attorney.*Martin v. Lilly*, 139, 144, 145 (6).

**KNOWLEDGE—**

Allegations, sufficiency, see **CRIMINAL LAW** 10.

Expert testimony, see **EVIDENCE** 3.

**LACHES—**

Delay in claiming exemption, sufficiency of excuse, see **EXECUTION** 1.

**LAW OF THE CASE—**

See **APPEAL** 46; **HIGHWAYS** 9.

**LEGISLATIVE POWER—**

See **CONSTITUTIONAL LAW** 1, 7-11; **HIGHWAYS** 10; **MUNICIPAL CORPORATIONS** 1; **TAXATION** 3, 6.

**LIBEL AND SLANDER—**

1. *Evidence.—Sufficiency.*—In an action for libel, evidence that the defendant told witnesses before the publication of the alleged libelous matter that such matter would appear concerning the plaintiff and the testimony of the plaintiff that such defendant had said to him, "Oh I will show you up good and proper \* \* \*. I will show up your consistency," with other similar evidence, is held sufficient to sustain the verdict that such defendant composed the libelous matter and caused it to be published. *Sourbier v. Brown*, 554, 566 (13).
2. *Instructions.—Necessity of Requests.*—In an action for libel, where one of two defendants claimed he was liable only for a secondary, and not a primary, publication of the libel, an instruction that, if such secondary publication was established, then both defendants were liable, is incomplete, but not erroneous in the absence of a tender of a complete instruction on the subject by the party objecting. *Sourbier v. Brown*, 554, 569 (17).
3. *Instructions.—Reversible Error.*—Where one of two defendants claimed he was liable only for secondary, and not a primary, publication of a libel, an instruction authorizing only one basis for estimating damages, which was applicable only to a verdict for a primary publication, was erroneous, where another instruction authorized a verdict for the plaintiff based on a secondary publication alone, since the jury must have understood that the damages to be awarded against such defendant for participation in the secondary publication should rest on the same basis as though he had participated in the primary publication. *Sourbier v. Brown*, 554, 570 (18).
4. *Joint Actions.*—A joint action cannot be maintained against the maker of a secondary publication and the makers of the primary publication for the recovery of all damages resulting from the primary publication. *Sourbier v. Brown*, 554, 559 (5).
5. *Joint and Several Liability.*—The writer and a person making publication of a libel are jointly and severally liable. *Sourbier v. Brown*, 554, 559 (2).
6. *Joint Liability.*—In an action for libel against two defendants, a showing that both participated in the unlawful act is sufficient to create joint liability, it being unnecessary that they acted with a common motive or design. *Sourbier v. Brown*, 554, 568 (15).

## LIBEL AND SLANDER—Continued.

7. *Primary Publication.—Copying.—Liability.*—A person who copies primary libelous matter and publishes or otherwise distributes copies thereof is guilty of publishing a new and distinct libel for the consequences of which he is responsible to the exclusion of the makers of the primary publication.  
*Sourbier v. Brown*, 554, 560 (7).
8. *"Primary Publication."—Mailing.*—The sending of a libelous circular letter by mail constitutes a primary or original publication thereof as to persons reading the letter.  
*Sourbier v. Brown*, 554, 559 (3).
9. *Publication.*—The actionable wrong in libel is the publication of the false and defamatory writing.  
*Sourbier v. Brown*, 554, 558 (1).
10. *"Secondary Publication."*—The exhibiting or remailing of a libelous letter by a person receiving it constitutes a secondary publication.  
*Sourbier v. Brown*, 554, 559 (4).
11. *Secondary Publication.—Liability.*—The maker of a secondary publication of libelous matter is liable for the consequences thereof, but he is not responsible for a primary publication in which he did not participate.  
*Sourbier v. Brown*, 554, 559 (6).
12. *Verdict.—Special Interrogatories.—Conflict.*—In a libel action against two defendants jointly, in which a joint verdict and a joint judgment were rendered, an answer to a special interrogatory finding that one of the defendants either composed the letter or caused it to be published, it not showing which of the two acts he did, is not in conflict with the general verdict, as the court on appeal will regard the general verdict as finding that such defendant did both of such acts as charged in the complaint. *Sourbier v. Brown*, 554, 561 (10).
13. *Verdict.—Special Interrogatories.*—In a libel action against two defendants as joint tort-feasors, in which a joint verdict and a joint judgment were rendered, an answer to a special interrogatory negating a charge of conspiracy on the part of one of the defendants as to the publication of the libelous matter was not in conflict with the general verdict which did not rest solely on the charge of conspiracy contained in the complaint, there being other allegations that such defendant composed the libelous matter, procured it to be published and participated in the publication, the proof of any one of which would render him jointly liable with another participating therein.  
*Sourbier v. Brown*, 554, 561 (9).

## LICENSEES—

Liability of railroad company for injuries, see RAILROADS 5, 6.

## LICENSE—

Trading stamp business, statute, validity, see CONSTITUTIONAL LAW 2.

## LIFE ESTATES—

*Liability for Taxes.—Failure to Receive Income.—Effect.*—A deed delivered to the grantee during the grantor's life containing no covenants of warranty nor agreement as to taxes, in which deed the grantor reserved a life estate and possession of the

**LIFE ESTATES—Continued.**

land, required that the life tenant pay the taxes during the life tenancy, provided she derived sufficient income therefrom, and, where there was no showing that she received any income, the land was liable for the taxes so assessed.

*Nation v. Green, Exr.*, 697, 709 (8).

**LIFE INSURANCE—**

See **INSURANCE**.

**LIS PENDENS—**

*Notice.—Purchaser at Execution Sale.*—A purchaser at an execution sale takes with notice of all rights that may legally grow out of a pending suit to enjoin such sale on the ground that the property is exempt. *Luckett v. Hammond*, 484, 491 (10).

**LOCAL LAWS—**

See **STATUTES 5**.

**MACHINERY—**

Manufacturers, defective construction, liability, see **NEGLIGENCE 11, 12**.

**MANDAMUS—**

1. *Office.—Possession.*—Mandamus is the proper remedy to obtain possession of an office from a person wrongfully holding over where the facts show that the plaintiff has been legally elected to, and has qualified for, the office.

*Arnold v. State, ex rel.*, 222, 224 (1).

2. *Remedy.—Scope.*—Mandamus will be issued only in cases where the facts show a clear legal right on the relator's part to the relief sought and a clear legal duty resting on the defendants to perform the thing demanded.

*State, ex rel. v. City of Indianapolis*, 685, 691 (1).

3. *Schools.—Transfer of Pupil.—Sufficiency of Complaint.*—The validity of §6449 Burns 1914, Acts 1909 p. 173, relative to the transfer of pupils, will not be determined in a mandamus action to compel a township trustee to transfer a pupil to a private school, where the complaint fails to allege an appeal to the county superintendent and an order for the transfer under §6451 Burns 1914, Acts 1901 p. 448, since the superintendent has authority under the statute to decide certain purely school questions and his decision, based on such questions, denying a transfer would prevent the question of validity to arise.

*Poer, Trustee v. State, ex rel.*, 55, 59 (2).

**MANSLAUGHTER—**

See **CRIMINAL LAW 2; HOMICIDE 3**.

**MASTER AND SERVANT—**

See also **NEGLIGENCE 2; PLEADING 6**.

1. *Action for Injuries.—Complaint.*—A servant's complaint for injuries is not insufficient on demurrer merely on the ground that certain material facts are not directly averred and that their existence is left to inference.

*Fauvre Coal Co. v. Kushner*, 314, 325 (7).

## MASTER AND SERVANT—Continued.

2. *Action for Injuries.—Complaint.*—A servant's complaint for injuries need not specifically allege that a duty was owing from the master, where the facts pleaded are sufficient to warrant an inference of such fact.  
*Fauvre Coal Co. v. Kushner*, 314, 326 (9).
3. *Action for Injuries.—Complaint.*—A servant's complaint showing that the defendant owed the plaintiff a duty and containing a general charge of negligent failure to discharge such duty which resulted in the injury complained of is sufficient to withstand a demurrer.  
*Fauvre Coal Co. v. Kushner*, 314, 326 (10).
4. *Contributory Negligence.—Ordinary Care.—Jury Question.*—In an action under the federal Employers' Liability Act by the plaintiff conductor for injuries sustained in a rear-end collision between freight trains, whether the conductor was guilty of contributory negligence in failing to observe rules relative to the dropping of fuses for the purpose of warning an approaching train was a question for the jury, where such rules were not specific, but permitted the trainmen, in the observance thereof, to exercise the care that men of ordinary prudence would use under the particular circumstances.  
*Jackson, Rec., v. Rutledge*, 415, 430 (16).
5. *Contributory Negligence.—Evidence.*—In an action under the federal Employers' Liability Act for injuries sustained by the plaintiff conductor in a rear-end collision between freight trains, the failure of the plaintiff to have a light burning in the cupola of the caboose did not constitute contributory negligence as a matter of law, under evidence showing that the light would not burn, that the plaintiff was using the caboose for the first time and had no previous knowledge of the defective condition of the light.  
*Jackson, Rec. v. Rutledge*, 415, 431 (17).
6. *Injuries to Conductor.—Negligence.—Sufficiency of Evidence. Verdict.*—In an action under the federal Employers' Liability Act for injuries sustained by the plaintiff conductor as a result of a collision, the evidence is reviewed and held sufficient to support a verdict for the plaintiff on the issue of the defendant's negligence, in view of the rule that the verdict, as against the objection that it is wholly unsupported by evidence, must stand on appeal unless the court finds that the evidence most favorable to the plaintiff appellee is such that no reasonable inference of the negligence charged can be drawn therefrom.  
*Jackson, Rec., v. Rutledge*, 415, 421 (3).
7. *Injury to Servant.—Contributory Negligence.—Evidence.*—In an action under the federal Employers' Liability Act by a conductor for injuries sustained in a rear-end collision between freight trains, the Supreme Court cannot say as a matter of law that the plaintiff was guilty of contributory negligence for failing to require the rear brakeman to observe a certain rule relative to the guarding of the rear of the train, which rule applied only when the train was stopped, in view of evidence from which the jury could find that the train was kept moving.  
*Jackson, Rec., v. Rutledge*, 415, 429 (15).
8. *Injuries to Servant.—Employers' Liability Act.*—Section 2 of the Employers' Liability Act (Acts 1911 p. 145, §8020b Burns 1914) makes no distinction between general and special orders; hence, in a servant's action for injuries alleged to have resulted

**MASTER AND SERVANT—Continued.**

from an order, etc., it is not necessary to allege whether the order was general or special.

*Fauvre Coal Co. v. Kushner*, 314, 322 (1).

9. *Liability for Agent's Acts.—Relation of Parties.*—Where an automobile was returned to the owner's residence after repairs had been made and the owner permitted the repairman to drive it back to the garage, accompanied by the owner's son, who was to return it, the car on such trip was not used in the defendant's business so as to make him liable for injuries to a passenger in another vehicle with which the automobile collided.

*Martin v. Lilly*, 139, 141 (1).

10. *Negligence of Servant.—Master's Liability.—Instructions.*—In a railway conductor's action for injuries under the federal Employers' Liability Act, where all the negligence charged related to the conduct of the engineer and the conductor of a train that collided with the train upon which the plaintiff was conductor, an instruction that, if the first named employes committed any of the acts of negligence charged which proximately caused the plaintiff's injury, the defendant would be liable, was not objectionable as imposing a liability on the defendant for negligent acts of such employes outside the scope of their employment.

*Jackson, Rec.*, v. *Rutledge*, 415, 425 (7).

**MEANDER LINES—**

See PUBLIC LANDS; WATERS AND WATERCOURSES.

**MEMORANDA—**

See PLEADING 8.

**MEMORIALS—**

Hon. John H. Gillett, p. xxxii.

Hon. Leander J. Monks, p. xxviii.

**MENTAL CAPACITY—**

See INSANE PERSONS.

**MERGER—**

Of offenses, see CONSPIRACY 13.

**MISCONDUCT—**

Of counsel, see APPEAL 36.

**MODIFICATION—**

Of judgment, as to place of imprisonment, see CRIMINAL LAW 71.

**MOTIONS—**

See NEW TRIAL.

To make more specific, see PLEADING 3, 10.

**MOTIVE—**

See ARSON 2; CRIMINAL LAW 35.

**MUNICIPAL CORPORATIONS—**

See also ELECTIONS.

Public streets, see also DEDICATION 4.

## MUNICIPAL CORPORATIONS—Continued.

1. *Assessment Districts.—Legislative Power.*—The legislature has power to authorize the establishment of assessment districts without regard to the boundaries of municipalities.  
*City of Indianapolis v. Bryan*, 586, 591 (6).
2. *Public Improvements.—Assessments.—Authority to Levy.*—A municipality has no power to raise money to pay the costs and expenses of making a local public improvement, unless such authority is expressly conferred by the legislature.  
*City of Indianapolis v. Bryan*, 586, 589 (1).
3. *Parks.—Public Improvements.*—The construction of a boulevard or park improvement by the city of Indianapolis, under Acts 1911 p. 231, §8748 *et seq.* Burns 1914, was an improvement of such a public nature that real estate lying outside the corporate limits, but within the assessment district created by the board of park commissioners, could be assessed with its proportion of the cost, and such assessment did not constitute a taxation of such property for the benefit of the city in its corporate capacity.  
*City of Indianapolis v. Bryan*, 586, 589 (4).
4. *Public Parks.—Lands Outside Corporate Limits.—Power to Assess.*—The legislature had authority to grant to a city, as in Acts 1911 p. 231, §8748 *et seq.* Burns 1914, authority to levy assessments on realty benefited by a park improvement, though lying outside the corporate limits, but within the assessment district created by the board of park commissioners, unless the exercise of such power would deprive the parties so assessed of some right guaranteed by fundamental law.  
*City of Indianapolis v. Bryan*, 586, 589 (2).
5. *Streets.—Establishment by Public User.—Railroad Right of Way.*—Where a grantor conveyed by quit-claim deed a right of way to a railroad company in fee simple, without specifying the width thereof, but the parties understood and intended the width to be eighty feet, and the company and its successor were in undisturbed possession thereof for more than forty years, using it for its tracks and for loading and unloading cars, etc., the fact that the public, as well as persons having business with the railroad company, drove over a part of it does not show a use that is either exclusive or adverse so as to establish a street by public user.  
*Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co.*, 230, 239 (4).
6. *Street Improvements.—Acceptance.—Rescission of Order.*—Though the board of public works, by approval of the report of the city engineer, entered an order accepting street improvements as completed according to the contract, the board had the right to rescind the order on the discovery that the work had not been properly constructed and was of no benefit to property affected, and it was the duty of the board to exercise that power, unless the rights of innocent parties had intervened so as to make such course inequitable.  
*State, ex rel. v. City of Indianapolis*, 685, 692, 695 (4).
7. *Street Improvements.—Final Assessments.*—In view of §8711 Burns 1914, Acts 1909 p. 412, neither the contractor nor the assignee of assessments for street improvements can require the board of public works of the city to make final assessments to pay for the work, unless such work has been finally accepted as completed in accordance with the contract.  
*State, ex rel. v. City of Indianapolis*, 685, 692 (3).

## MUNICIPAL CORPORATIONS—Continued.

8. *Street Improvements.—Assignment of Assessments.—Assignee's Rights.*—Where a contractor for street improvements assigned assessments before the board of public works had taken any action as to accepting or rejecting the work done under the contract, the board, in rescinding an order of acceptance thereafter made, did not prejudice the rights of the assignee, since the assignee's position was no more advantageous than that of the contractor had no assignment been made.  
*State, ex rel. v. City of Indianapolis, 685, 696 (9).*
9. *Street Improvements.—Compliance with Contract.—Acceptance.*—The decision of the board of public works as to whether street improvements have been made in substantial compliance with the statute is quasi-judicial in its nature and when made is conclusive, in the absence of fraud, on all persons affected thereby, and may be set aside only in a direct proceeding for that purpose on the ground of fraud.  
*State, ex rel. v. City of Indianapolis, 685, 694 (8).*
10. *Street Improvements.—Acts of Officers.—Payment of Contract Price.—City's Liability.*—In awarding contracts and performing other duties imposed by the statute authorizing such proceedings, the municipal officers do not act in behalf of the municipality in such a way as to create any liability against it under the contract, since the contract price can be paid only from special assessments made under statutory authority, and the contractor is bound by the statutory provisions which authorize and govern the contract and provide for its acceptance.  
*State, ex rel. v. City of Indianapolis, 685, 694 (7).*
11. *Street Improvements.—Authority to Make Assessments.*—A municipality has no power to make assessments for street improvements without statutory authority.  
*State, ex rel. v. City of Indianapolis, 685, 693, 694 (6).*
12. *Street Improvements.—Inspection.—Waiver of Defects.*—Though the work and operations of the contractor for street improvements, and the kind and character of the material used, were supervised as the work progressed by the engineering department of the city, such facts cannot be held as a waiver by the city of its right to reject the work for failure to construct it as required by the contract, the rights and duties of the city being purely statutory.  
*State, ex rel. v. City of Indianapolis, 685, 693, 695 (5).*
13. *Street Improvements.—Contractor.—Assignment of Assessments.—Rights of Assignee.*—The assignment by the contractor of assessments to be made on the completion of a street improvement, and its acceptance by the city, conferred on the assignee an equitable interest therein, but the interest acquired thereunder was no different than that of the contractor, in the absence of the assignment, and was therefore subject to any defenses which might exist against the contractor.  
*State, ex rel. v. City of Indianapolis, 685, 691 (2).*
14. *Street Improvements.—Completion of Contract.—Authority of Municipality.*—An assignee of assessments for street improvements is not in position to complain of the refusal of the board of public works, after the rejection thereof for failure to comply with the contract, to take steps, by contract or otherwise, to complete the work in accordance with the contract,



## MUNICIPAL CORPORATIONS—Continued.

the city being under no duty to the contractor to cause the completion of the work.

*State, ex rel. v. City of Indianapolis*, 685, 697 (10).

15. *Sewers.—Construction.—Priority of Claims.*—In the construction of a sewer under §8711 *et seq.* Burns 1914, unpaid claims for material furnished to a contractor who afterwards abandoned the contract have no priority over the claims of a third party who advanced money to the contractor under an equitable assignment of the proceeds of the contract, but are inferior thereto.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 634 (10).

16. *Sewers.—Construction.—Assignment of Assessment Roll.*—Under §§8711 *et seq.* Burns 1914 (Acts 1907 pp. 167, 550, Acts 1909 p. 412), a contractor who has a valid contract with a city for the construction of a sewer can make a valid assignment to a third party of the assessment roll, but the assignee acquires thereby only the contractor's interest in the assessments on the completion of the contract; and, where the contractor abandons the contract, there is no basis for any assessments against the property until the final estimate provided for in the statute can be made, and the assignment is therefore operative or enforceable only for the amount of the final estimate less the costs and expenses of completing the work, such costs being entitled to priority in the distribution of the assets, regardless of whether the work was completed by the city or by reletting the contract or by any other means authorized by law. *Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 630, 631, 635 (2).

17. *Sewers.—Construction.—Rights of Laborers and Materialmen.*—The statute (§§8711 *et seq.* Burns 1914) does not give to persons furnishing material, or to those performing labor, for the construction of a sewer any claim against the city or any lien on the assessments made to pay the costs of the improvement, their only remedy being against the contractor, unless the contractor's bond by its terms inures to their benefit.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 634 (9).

18. *Sewers.—Construction.—Assignments.*—Where a contractor abandoned the contract for construction of a sewer, and the work was completed by a receiver, an assignee of the assessment roll who acquiesced in the appointment of the receiver and the manner of completing the work, may not question the authority of the receiver nor complain that the cost was greater than would have been necessary had some other plan been pursued in completing the work.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 633 (7).

19. *Sewers.—Construction.—Abandonment of Contract.—Rights of Receiver.*—Where a contractor for the construction of a sewer, under §8711 *et seq.* Burns 1914, abandoned the contract, a receiver appointed to complete the work was entitled to receive from the city the entire proceeds of the contract, less any amount paid to the contractor on certificates issued on partial estimate, and less also the ten per cent, which the city was required under the contract to hold for five years for the purpose of keeping the sewer in repair.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 634 (11).

20. *Sewers.—Construction Bond.—Liability.*—The contractor's bond for the construction of a sewer, under §8711 *et seq.*

## MUNICIPAL CORPORATIONS—Continued.

Burns 1914, was for the protection of the property affected, and the surety thereon became liable for all unpaid claims for labor and materials which entered into the construction of the sewer, but not for money loaned or advanced to the contractor by a third person.

*Aetna Trust, etc., Co. v. Nackenhorst, Rec., 621, 633 (8).*

## MURDER—

See HOMICIDE.

## NAMES—

*Assumed Business Name.—Failure to File Certificate.*—The failure of the plaintiff to comply with §9711a *et seq.* Burns 1914, Acts 1909 p. 358, requiring persons conducting business in the state under any name, etc., other than their real names to file certificates with the clerk, etc., renders void and prevents recovery on a sales contract made by him.

*Horning v. McGill, 332, 334 (2).*

## NEGLIGENCE—

See also APPEAL 32; BRIDGES; MASTER AND SERVANT; RAILROADS; TRIAL 11.

1. *Carriers.—Protection of Passengers.*—If greater precautions are required to protect passengers while in transit, it is because the conditions and circumstances surrounding them are different and involve more danger, and not because of the relation of carrier and passenger.

*Union Traction Co. v. Berry, Admr., 514, 524, 527 (8).*

2. *Contributory Negligence.—Proof.—Rule Under Federal Employers' Liability Act.*—In an action under the federal Employers' Liability Act by a conductor of a train for personal injuries suffered in a collision, it is only after negligence on the part of the defendant is shown that it becomes material to determine the question of the plaintiff's contributory negligence, which under the act can only diminish the damages recoverable.

*Jackson, Rec., v. Rutledge, 415, 420 (2).*

3. *Contributory Negligence.—Questions for Court and Jury.*—In personal injury cases, the question of the plaintiff's contributory negligence is for the jury, unless upon the controlling facts reasonable minds can come to but one conclusion, in which event the question is one of law for the court.

*Lake Erie, etc., R. Co. v. McFarren, 113, 117 (4).*

4. *Definition.—Degrees.—Duty.*—Negligence is the neglect or violation of the duty to use care; there can be no degrees of negligence, and hence no degrees of duty.

*Union Traction Co. v. Berry, Admr., 514, 520 (3).*

5. *Due Care.—Jury Question.*—Whether the conduct of an automobile driver under given circumstances constitutes the care that an ordinarily prudent person would exercise under like circumstances is a question for the jury.

*Martin v. Lilly, 139, 144 (4).*

6. *Duty.—"Due Care."—Standard of Care.—Instructions.*—In submitting to a jury a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes, and also to state the rule fixing the standard of care which will measure up to such duty; the

## NEGLIGENCE—Continued.

duty remains the same under all circumstances and is defined as "due care," "ordinary care," or "reasonable care," which terms have the same significance, and the standard of care measuring up to such duty is the care that a person of ordinary prudence would regard as reasonably necessary or proper under the circumstances.

*Union Traction Co. v. Berry, Admr.*, 514, 521, 528 (5).

7. *Duty to Use Care.—Question of Law.*—Whether a given relation existing between parties gives rise to a duty to use care is a pure question of law.

*Union Traction Co. v. Berry, Admr.*, 514, 520 (4).

8. *Duty to Use Care.—Rule as to Carriers.*—The law does not impose a different or higher duty on carriers of passengers with reference to the exercise of care than it imposes on persons or corporations sustaining other relations involving the exercise of care. (*Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, disapproved.) *Union Traction Co. v. Berry, Admr.*, 514, 520, 523 (2).

9. *Jury Question.*—Where the facts set out in a servant's complaint for injuries are reasonably susceptible to more than one inference or conclusion as to the existence of negligence or contributory negligence, the question is for the jury.

*Fauvre Coal Co. v. Kushner*, 314, 325 (8).

10. *Manufactured Products.—Care Required.—Defective Articles.—Notice.*—The manufacturer of products that in their nature are not inherently dangerous when free from defects owes no duty to exercise care in their manufacture for the safety of persons with whom he has no privity of contract; but where a manufactured product when sold by the manufacturer is dangerous for its intended use, to the manufacturer's knowledge, it is his duty to notify the purchaser of the defects and his failure to notify renders him liable for resulting injuries.

*Travis, Admx., v. Rochester Bridge Co.*, 79, 84 (4).

11. *Manufactured Products.—Independent Contractors.—Liability.—Cases Distinguished.*—The liability of manufacturers of machinery for injuries resulting to persons not parties to the contract, on account of defects in construction, is distinguished from the liability of independent contractors for injuries resulting from defective construction of bridges or like structures, in that the manufactured product is made according to plans, and under direction, of the manufacturer, while the work of the contractor is generally done according to plans, or under supervision, of the party letting the contract.

*Travis, Admx., v. Rochester Bridge Co.*, 79, 83 (3).

12. *Manufactured Products.—Liability for Injuries.*—Where the purchaser of a manufactured article not inherently dangerous accepts the article with knowledge of dangerous defects therein, the liability to third persons for injuries resulting therefrom rests upon him, and not upon the manufacturer; but the rule is otherwise if the article is inherently dangerous, regardless of the question of knowledge.

*Travis, Admx., v. Rochester Bridge Co.*, 79, 85 (5).

13. *Ordinary Care.—Jury Question.*—It is the duty of the jury to determine, as a question of fact in each case, whether the

**NEGLIGENCE—Continued.**

conduct of the party on whom a duty rests measures up to the standard of ordinary care as defined by the law.

*Union Traction Co. v. Berry, Admr.*, 514, 519, 522, 527, 528 (1).

14. "Ordinary Care."—"Ordinary care" requires that the acts of care employed and the precautions used must be commensurate to the danger involved under the circumstances of the particular case.

*Union Traction Co. v. Berry, Admr.*, 514, 522 (6).

15. *Pleading.—Contributory Negligence.*—In personal injury cases, the complaint need not negative contributory negligence, since such negligence is a matter of defense; and the complaint is sufficient, unless the plaintiff's contributory negligence appears to reasonable minds as the only conclusion from the facts pleaded.

*Hill v. Chicago, etc., R. Co.*, 130, 135 (5).

**NEW TRIAL—**

Presenting questions, review, see **APPEAL 2**.

Striking out motion, presumption, see **APPEAL 19**.

**NOMINAL DAMAGES—**

See **FRAUD 4**.

**NOTICE—**

To purchaser at execution sale, see **LIS PENDENS**.

Necessity, under Bulk Sales Act, see **FRAUDULENT CONVEYANCES 3**.

When necessary, in making public improvements, see **TAXATION 4**.

**NUISANCE—**

See also **JUDGMENT 3**.

Intoxicating liquors, keeping place, charging offense, see **INTOXICATING LIQUORS 9**.

1. *Damages.—Continuing Nuisance.*—In an action for injury to products of the soil caused by a continuing abatable nuisance, the measure of damages is the depreciation in the rental value of the real estate affected.

*Indiana Pipe Line Co. v. Christensen*, 400, 403, (2).

**NUNC PRO TUNC—**

See **EXCEPTIONS, BILL OF**.

**OBITER DICTUM—**

See **COURTS 5**.

**OBJECTIONS—**

See **APPEAL 1**.

**OFFICE—**

Possession from one wrongfully holding over, see **MANDAMUS 1, 2**.

**OFFICERS—**

1. *Claim to Office.—Injunction.*—Where the title to an office is clearly an unsettled question, a claimant to the office may be enjoined by one occupying the office under a claim of right until the former shall have established his title in an action at law.  
*Felker v. Caldwell, 364, 366 (1).*
2. *De Facto.—Election under Invalid Act.*—One who is elected or appointed to an office under an unconstitutional statute, before such statute is adjudged to be so, is an officer *de facto*.  
*Felker v. Caldwell, 364, 367 (3).*
3. *De Facto.—Right to Injunctive Relief.*—Under Acts 1901 p. 516, §7890 Burns 1914, relative to oil inspection and the appointment of a supervisor thereof, though the duties of such supervisor were extended and the mode of compensation was changed from a fee to a salary basis, the duties of the office were not so materially changed as to create a different office from that provided in the previous acts of 1881 and 1891 on the same subject, and the Governor's appointment of such inspector under the 1901 act was an appointment to an existing office and constituted the appointee, at least, a *de facto* officer, and a *de jure* officer if the act of 1901 was valid; hence such appointee was entitled to injunctive relief against a rival claimant, appointed by the state geologist under the act of 1891, who was interfering with the duties of the office.  
*Felker v. Caldwell, 364, 369 (6).*

**OIL—**

Damage to real estate, see ACTION 5; DAMAGES 5.

**OPINIONS—**

When basis of actionable fraud, see FRAUD 5.

Expert, see EVIDENCE 2-4, 8, 9.

**OVERT ACT—**

Necessity of showing, in indictment for conspiracy, see CONSPIRACY 4.

**OWNERSHIP—**

Proof, sufficiency, see ARSON 3.

Of stolen goods, evidence, see RECEIVING STOLEN GOODS 3.

**PARKS—**

See MUNICIPAL CORPORATIONS 3, 4.

Improvements, statute, validity, see CONSTITUTIONAL LAW 15.

**PAROL—**

See EVIDENCE 6.

**PARTIES—**

On appeal, see APPEAL 3.

Suit to enjoin execution sale, see EXECUTION 4.

**PASSENGERS—**

See CARRIERS.

**PATENTS—**

See PUBLIC LANDS.

**PLATS—**

Admissibility as evidence, see DEEDS 2.

**PLEA—**

See CRIMINAL LAW 13-19.

**PLEADING—**

Review of rulings as to pleadings, see APPEAL.

For pleadings in particular actions or proceedings, see also the various specific topics.

1. *Complaint.—Demurrer.*—Though a complaint states a cause of action for only nominal damages, the overruling of a demurrer thereto on the grounds of insufficiency will be sustained on appeal. *Rochester Bridge Co. v. McNeill*, 432, 438 (4).
2. *Complaint.—Sufficiency.—Overcoming Defects.*—Where a complaint states a cause of action and also facts disclosing a defense thereto, the pleading is fatally defective unless it states facts sufficient to overcome the defenses disclosed. *Prudential Ins. Co. v. Ritchey*, 157, 161 (4).
3. *Complaint.—Motion to Make More Specific.—Wills.*—Where a complaint to set aside a will was based on the grounds of unsoundness of mind, undue execution and undue influence, the first two being in the language of the statute, a motion to make more specific was properly denied, for the reasons that such motion is unavailing as against the grounds stated in the language of the statute, and, though undue influence is not a statutory ground, it is an authorized one and evidence in support thereof was admissible under the allegations of unsoundness of mind and undue execution. *Phillips v. Gammon*, 497, 498 (1).
4. *Conclusions.—Waiver of Objection.*—If no motion is made to require a party filing a pleading to state the facts necessary to sustain conclusions alleged, all objections to the pleading of such conclusions are waived, in view of §343a Burns 1914, Acts 1913 p. 850. *Fauvre Coal Co. v. Kushner*, 314, 324 (4).
5. *Construction.—Inferences.—Demurrer.*—A complaint to which a demurrer has been filed will be deemed sufficient whenever the necessary allegations, even though stated illogically and by way of argument, can be fairly gathered from it, and all facts will be deemed stated that can be implied from the allegations made by fair and reasonable intendment, and will be given the same force as if directly stated. *Fauvre Coal Co. v. Kushner*, 314, 325 (5).
6. *Definiteness.*—In a miner's action for injuries, an allegation that the plaintiff was, by instructions of the defendant, sitting on a car loaded with dirt while driving down a mine entry, was a direct averment of the fact that the defendant had instructed the plaintiff to sit on such car while driving down the entry. *Fauvre Coal Co. v. Kushner*, 314, 323 (2).
7. *Demurrer.—Admissions.*—A demurrer to a complaint admits not only the facts directly and specifically alleged but also all facts that can be implied by reasonable and fair intendment. *Rochester Bridge Co. v. McNeill*, 432, 439 (6).

**PLEADING—Continued.**

8. *Demurrer.—Attached Memorandum.*—Section 344, cl. 6, Burns 1914, Acts 1911 p. 415, providing that a memorandum shall be filed with a demurrer stating wherein the pleading demurred to is insufficient for want of facts, was intended to compel the party demurring to waive review of questions not disclosed to the trial court; but neither the trial court nor the appellate court is bound by such waiver where manifest injustice would result by enforcing it. *Poer, Trustee, v. State, ex rel.*, 55, 59 (1).
9. *Motions.—Character of.—Determining From Prayer.*—Though the name and prayer of a pleading or motion may be advisory in determining its character and effect, they will not be allowed to control the remedy chosen as shown by the facts stated. *Phillips v. Gammon*, 497, 500 (4).
10. *Motion to Make More Specific.*—Where a motion to make the complaint more specific might properly be sustained, it is not error to overrule it if the pleading is sufficiently specific to make apparent the precise nature of the charge that the defendant is called upon to meet and defend. *Fauvre Coal Co. v. Kushner*, 314, 323 (3).
11. *Positiveness.—Participial Phrases.*—The rule requiring every material fact to be positively and directly alleged has been relaxed, and a fact pleaded by means of participial phrases will be given the same force and effect as though directly stated. *Fauvre Coal Co. v. Kushner*, 314, 325 (6).
12. *Supplemental Complaint.—Acts Performed After Filing.—Amendment.*—In an action to enjoin an execution sale, though allegations showing the sheriff's sale and the execution of a sheriff's deed to have occurred after the filing of the complaint were proper subjects for a supplemental complaint, under §408 Burns 1914, §399 R. S. 1881, the pleading thereof by way of amendment, though not an approved method, was more a defect of form than of substance, since the result sought—the freeing of the property from the cloud cast upon it by the levied execution and later by the sale and deed—was not materially different. *Lockett v. Hammond*, 484, 489 (6).
13. *Suit to Enjoin Execution Sale.—Amendment.—New Cause.*—In a suit to enjoin an execution sale, on the ground that the property was exempt, a paragraph of amended complaint filed after the execution sale, and seeking relief from such sale on the same ground, was not objectionable as being a new and different cause of action, the facts pleaded being in harmony with the original cause and the character of the demand remaining the same. *Lockett v. Hammond*, 484, 491 (11).

**PLEDGES—**

See EVIDENCE 1, 5-7; HUSBAND AND WIFE 1, 3, 6.

**POLICE POWER—**

See CARRIERS 16; CONSTITUTIONAL LAW 13, 14.

**POLICY—**

See INSURANCE.

**PRAYER—**

Character and effect of pleading, determination, see PLEADING 9.

**PREJUDICE—**

See JUDGES.

**PREMIUMS—**

Payment by third party, rights, see INSURANCE 2.

**PRESUMPTIONS—**

See CARRIERS 11; TRIAL 9.

On appeal, see APPEAL 18-20; CRIMINAL LAW 13, 86.

Statutes, validity, construction, see CONSTITUTIONAL LAW 16; STATUTES 1.

**PRIMA FACIE CASE—**

See DRAINS 8; STATUTES 4; TRESPASS 4.

**PRINCIPAL AND SURETY—**

1. *Change of Contract.—Release of Surety.*—Where notes were executed for the purchase price of a stallion which was warranted as a sure breeder, and the dates of maturity were so arranged that the breeding test could be completed before any note became due, an agreement by which an unpaid balance of one note was canceled and the plaintiff's payees were relieved from all liability on the warranty, without knowledge or consent of the surety, released the surety.

*Crouch & Son v. Parker*, 660, 669 (4).

2. *Liability of Surety.—Extent.*—Sureties not for hire are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions or equities are never allowed to enlarge or to change in any degree their legal obligations.

*Crouch & Son v. Parker*, 660, 666, 669 (3).

**PRIORITIES—**

See DOWER 4; RECEIVERS 2.

**PROHIBITION ACT—**

Validity, see STATUTES 4, 6, 7.

**PROSECUTOR—**

Special, appointment, validity, see CRIMINAL LAW 13; presence before grand jury, effect, see GRAND JURY 1.

**PROXIMATE CAUSE—**

Of death, sufficiency of showing in prosecution for manslaughter, see HOMICIDE 3.

**PUBLICATION—**

See LIBEL AND SLANDER.

**PUBLIC IMPROVEMENTS—**

See DRAINS; EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS; TAXATION 5.



**PUBLIC LANDS—**

**Title Under Patent.—Meander Lines.**—A grant by the state of land under the act of 1852 (1 R. S. 1852 p. 471), providing for the sale and reclamation of swamp lands, conveys only the surveyed portion above the meander line, since a grant of public land, being purely statutory, must be construed with reference to the statute under which it is made. (*Tolleston Club, etc., v. State*, 141 Ind. 197, distinguished and overruled in part.)

*Tolleston Club, etc. v. Carson*, 642, 657, 658 (5).

**PUBLIC SERVICE COMMISSION—**

Construction of interchange tracks, see **RAILROADS** 8-10.

Regulation of rates, see **CARRIERS** 4, 5, 9-21; **EVIDENCE** 2, 8, 9; **TELEGRAPHS AND TELEPHONES**.

1. **Appeal.—Expenses.—Determination.**—Where in a hearing as to reasonableness of rates of a telephone company, the Public Service Commission found against the company, an order of the commission that the company pay the costs of the hearing was not a ruling on an issue tried, but was in the nature of a judgment for costs, which was properly made against the company on entry of the order, under §10052v2 Burns 1914, Acts 1913 p. 167, §74; hence, on appeal to the circuit court, a judgment setting aside the commission's order was sufficient also to set aside its order for costs, necessitating the repayment to the company of an amount improperly collected therefor.

*Public Service Commission v. Frazee*, 573, 578 (7).

2. **Findings of Commission.—Effect on Appeal.**—Under §6 of the Public Service Commission Act (§5536 Burns 1914, Acts 1913 p. 820), the court to which an appeal is taken from the commission does not sit as a court of review, but the issues are tried *de novo*; hence the court is not bound by the findings of the commission, but should determine the case from the evidence adduced.

*Public Service Comm. v. Cleveland, etc., R. Co.*, 197, 200, 202 (1).

3. **Powers of.—Administrative.**—The functions vested by the legislature in the Public Service Commission are administrative in their nature and not judicial.

*Public Service Comm. v. Cleveland, etc., R. Co.*, 197, 201 (2).

4. **Reasonableness of Rates.—Evidence.—Admissibility on Appeal.**—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, where the reasonableness of such order has not been solved, evidence as to a practical test of the reasonableness thereof is admissible.

*Public Service Commission v. Frazee*, 573, 576 (3).

5. **Setting Aside Order.—Transcript of Proceedings.—Effect as Evidence.—Bill of Exceptions.**—Under §§69, 70 of the Public Service Commission Act (Acts 1913 p. 167, §10052a *et seq.* Burns 1914), a part of the transcript of the proceedings before the commission which is not put in evidence at the trial of an action to set aside an order is not part of the evidence heard at the trial, and should not be embodied in the bill of exceptions containing the evidence to be used on appeal.

*Chicago, etc., R. Co. v. Public Service Commission*, 334, 341 (5).

**QUARE CLAUSUM FREGIT—**

Trespass, nature of action, see **TRESPASS**.

**QUIETING TITLE—**

*Right to Relief.*—In suits to quiet title the plaintiff must recover, if at all, on the strength of his own title.

*Tolleston Club, etc. v. Carson*, 642, 651 (1).

**RAILROADS—**

See also **CARRIERS; DEEDS; MASTER AND SERVANT 4-7, 10; NEGLIGENCE 1-4, 6-8, 13-15.**

1. *Crossing Accident.—Contributory Negligence.—Burden of Proof.*—In an action against a railroad company for injuries sustained in a crossing accident, contributory negligence on the part of the plaintiff is a matter of defense, under Acts 1899 p. 58, §362 Burns 1914, and, in the absence of evidence on the subject, the jury's finding on that issue must be for the plaintiff, since the burden of proof thereon is upon the defendant.

*Lake Erie, etc., R. Co. v. McFarren*, 113, 116 (3).

2. *Crossing Accident.—Contributory Negligence.—Jury Question.—Signals.*—In an action for injuries sustained by the plaintiff at a railroad crossing, where the view of the track was obstructed and a gong had been installed to give warning of approaching trains, the plaintiff having knowledge of the gong and its purpose, it was not contributory negligence, as a matter of law, for the plaintiff, in approaching the crossing, to act on the assumption that the defendant would not violate an ordinance relative to speed and the giving of signals, nor to assume that the gong would be kept ringing when trains approached, the question being one of fact for the jury.

*Lake Erie, etc., R. Co. v. McFarren*, 113, 116, 118, 124 (1).

3. *Crossing Signals.—Negligence.*—The failure of a railroad company to give statutory signals as required by §5431 Burns 1914, §4020 R. S. 1881, is negligence *per se*.

*Hill v. Chicago, etc., R. Co.*, 130, 133 (1).

4. *Injuries to Persons on Tracks.—Invitees.—Care.*—Where a shipper was upon the tracks of a railroad company by implied invitation to do work mutually beneficial to himself and the company, it was the company's duty not only to exercise ordinary care to keep the premises safe but to use reasonable precautions to avoid exposing him to unnecessary peril.

*Hill v. Chicago, etc., R. Co.*, 130, 135, 137 (4).

5. *Injuries to Persons on Track.—Trespasser or Licensee.*—A shipper who, in assisting in the loading of cars, in accordance with a custom under which shippers moved the cars from a switch track into position for loading, went upon the tracks to move a loaded car so that another could be moved into place, was engaged in work mutually beneficial to himself and the company and was neither a trespasser nor a mere licensee, but was rightfully there by implied invitation.

*Hill v. Chicago, etc., R. Co.*, 130, 134 (3).

6. *Injuries to Persons on Tracks.—Trespasser or Licensee.*—The warning signals required of railroad companies at highway crossings, under §5431 Burns 1914, §4020 R. S. 1881, are for the benefit of travelers on the highways, and one injured in the railroad yards cannot base an action on the failure to give such signals.

*Hill v. Chicago, etc., R. Co.*, 130, 133 (2).

7. *Persons Entitled to Protection.*—A railroad company owes to one in its yards who, at its implied invitation, is doing work beneficial to a shipper and the company, the duty of equipping its locomotives with the headlights as prescribed by an order

**RAILROADS—Continued.**

of the Railroad Commission under §5583f Burns 1914, Acts 1909 p. 323.  
*Hill v. Chicago, etc., R. Co.*, 130, 136 (6).

8. *Construction of Interchange Track.—Order of Public Service Commission.—Sufficiency of Evidence.*—In an action by a railroad company to set aside an order of the Public Service Commission directing a physical connection of railroads for interchange of freight in carload lots, where no shipper or receiver of freight testified in the trial and there was no evidence to show that any freight in carload lots would be transferred over the proposed interchange tracks, and there was evidence tending to show that the company seeking such connection was actuated in part by a desire to gain an advantage in its contest for business, the showing is insufficient to justify an order for interchange tracks.

*Chicago, etc., R. Co. v. Public Service Comm.*, 334, 337, 339 (2).

9. *Construction of Interchange Tracks.—Public Necessity.*—The law does not contemplate that orders for the construction of interchange tracks between railroad companies shall be made for the purpose of aiding one carrier as against another in its competition for business, nor will such an order be denied because it may afford facilities advantageous to a company interested; the necessities of the public is the test in such cases, though the showing need not be of indispensable public necessity, the test being satisfied where it is shown that the construction of such interchange tracks will be a great convenience to shippers and will add materially to transportation facilities so as to be of substantial benefit to commerce.

*Chicago, etc., R. Co. v. Public Service Commission*, 334, 339 (3).

10. *Construction of Interchange Track.—Public Necessity.—Sufficiency of Evidence.*—The question whether there is a public necessity for the physical connection between railroad companies for the interchange of freight must be determined in each case in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier; it is not sufficient to show that a mere convenience would result to a few individuals, but it must appear that material and substantial benefit would result to the public from such connection.

*Chicago, etc., R. Co. v. Public Service Commission*, 334, 337 (1).

**RAPE—**

See also **CRIMINAL LAW** 21, 22, 49, 55.

1. *Affidavit.—Denial of Relation of Husband and Wife.*—An affidavit charging rape upon a female child under the age of consent was not defective for failure to state that such female was not then the wife of the defendant, since the part of the statute defining the offense makes no such exception.

*Sharp v. State*, 276, 278 (2).

2. *Evidence.—Guilty Knowledge.*—Though, in a prosecution for rape upon a girl under the age of consent, it is not incumbent upon the state to prove that the defendant had knowledge of the girl's age, testimony of the mother of the girl as to a conversation had with the defendant, or in his presence, regarding the daughter's age was not objectionable, though the conversation took place before the offense was committed, since it tended to show guilty knowledge.

*Koehler v. State*, 387, 390 (2).

**RAPE—Continued.**

3. *Evidence.—Want of Chastity.—Specific Acts.*—In a prosecution of a defendant, under Acts 1907 p. 85, for having carnal knowledge of a female child under sixteen years of age, it was not error to refuse to permit the prosecuting witness to answer, on cross-examination, questions as to whether she had ever had sexual intercourse with persons other than the defendant previously to a certain date, such evidence not being admissible as a defense to the charge, or as tending to show her chastity or unchastity or whether the offense charged was with or without her consent. *Barker v. State*, 263, 272 (13).
4. *Relation of Husband and Wife.—Defense.*—In a prosecution for rape upon a female child under the age of consent, though the part of the statute defining such offense makes no exception with regard to the husband of such female, the fact that the defendant is her husband may be proved as a defense. *Sharp v. State*, 276, 278 (1).
5. *Separate Offenses.—Statute.—Construction.*—Each act of intercourse with a female child under the age of sixteen, under Acts 1907 p. 85, constitutes a distinct offense. *Barker v. State*, 263, 274 (17).
6. *Sufficiency of Evidence.—Penetration.*—In a prosecution for rape upon a female child under the age of consent, the testimony of the prosecuting witness that she had sexual intercourse with the defendant was sufficient as proof of penetration, where it appeared that she understood the meaning of the term "sexual intercourse." *Flinn v. State*, 531, 532 (1).

**RATES—**

Regulation, see CARRIERS; EVIDENCE 2, 8, 9; PUBLIC SERVICE COMMISSION; TELEGRAPHS AND TELEPHONES.

**REAL ESTATE—**

Sale of, see BROKERS.

**REASONABLE DOUBT—**

See CRIMINAL LAW 37-39, 53, 55, 60, 90.

**RECEIVERS—**

1. *Adjudication of Claims.*—All claims should be filed in the proceeding in which the receiver is appointed, and the priorities and the order of payment determined therein, and not by cross-complaints in an action by the receiver to reduce the fund to his possession. *Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 624 (1).
2. *Claims.—Priorities.—Construction of Sewers.*—Where a contractor for the construction of a sewer, under §8711 *et seq.* Burns 1914, abandoned the contract, and a receiver was appointed to complete the work, the costs and expenses of completing the work, including the allowance to the receiver and all court costs, were entitled to priority over all other claims. *Aetna Trust, etc., Co. v. Nackenhorst, Rec.*, 621, 634 (12).

**RECEIVING STOLEN GOODS—**

1. *Instruction.—Applicability to Issues.*—In a prosecution for receiving a stolen automobile, an instruction on the subject of

**RECEIVING STOLEN GOODS—Continued.**

conspiracy, pursuant to which the defendant and another procured automobiles to be stolen for them to sell, in which instruction the jury was told that, if such conspiracy existed, the defendant would be bound by all things done and said by his coconspirator in carrying out the conspiracy, was not erroneous as being inapplicable to the issues.

*Marco v. State*, 540, 546, 548 (5).

2. *Instruction.—Certainty.*—In a prosecution for receiving a stolen automobile, an instruction that, if the jury should find that the two named persons alleged to have taken the automobile, or either of them, shot and killed the owner and, as a part of such transaction, took possession of the automobile, the taking under the circumstances constituted a larceny and that this would be true even though they intended to rob the owner of the car and not to steal it, was not erroneous as being misleading, uncertain or ambiguous.

*Marco v. State*, 540, 546, 547 (4).

3. *Ownership of Goods.—Evidence.—Sufficiency.*—In a prosecution for receiving a stolen automobile under an affidavit charging the ownership to have been in a named person, evidence tending to show that two men conspired to take it from the owner and sell it, and that in the execution of their intention the owner was killed, was sufficient to support a verdict of guilty, though the owner was dead at the precise time of the taking, since, the intention having existed long before the owner's death, the jury was justified in finding that to all intents and purposes the automobile was stolen prior thereto.

*Marco v. State*, 540, 545 (3).

4. *Reception from Robbers.—Larceny.*—It is no defense to a prosecution for receiving stolen goods that the article received was taken by robbers, and not in the commission of a larceny, since every robbery includes a larceny.

*Marco v. State*, 540, 542 (1).

5. *Variance.*—In a prosecution for receiving stolen goods, there is no variance between an affidavit charging larceny of the article received and the evidence showing that the article was taken by robbers, since every robbery includes a larceny.

*Marco v. State*, 540, 542 (2).

**RECKLESSNESS—**

Proximate cause of death, implication of intent, see **HOMICIDE** 4.

**RECORD—**

See **APPEAL** 5-9.

**REMEDIES—**

Cumulative, see **ACTION** 2.

Statutory, nature of, see **ACTION** 4.

**REMONSTRANCE—**

See **DRAINS** 8.

**REPLEVIN—**

See **EVIDENCE** 1, 5-7.

**REPRESENTATIONS—**

See FRAUD.

**REPUTATION—**

See CRIMINAL LAW 36; HOMICIDE 2; WITNESSES 3.

**RES GESTAE—**

See EVIDENCE 7.

**RESIDUARY ESTATE—**

See EXECUTORS AND ADMINISTRATORS.

**RES IPSA LOQUITOR—**

See CARRIERS 2.

**REVIEW—**

See APPEAL.

**RIGHT OF WAY—**

See DEEDS; MUNICIPAL CORPORATIONS 5.

**RIPARIAN OWNERSHIP—**

Doctrine, when inapplicable, see WATERS AND WATERCOURSES 2.

**ROADS—**

See HIGHWAYS.

**ROBBERY—**

Includes larceny, see RECEIVING STOLEN GOODS.

**SALES—**

See BROKERS; CONTRACTS 4; EXECUTION; EXEMPTIONS; FRAUDULENT CONVEYANCES.

Assumed business name, failure to file certificate, effect, see NAMES.

**SCHOOLS—**

Transfer of pupils, complaint, sufficiency, see MANDAMUS 3.

**SELF-DEFENSE—**

See CRIMINAL LAW 3.

**SENTENCE—**

See CRIMINAL LAW 68-71.

**SERVANTS—**

See MASTER AND SERVANT.

**SEWERS—**

Construction, see MUNICIPAL CORPORATIONS 15-20; RECEIVERS 2.

**SHIPPERS—**

See CARRIERS 13, 18-21.

**SIGNALS—**

See RAILROADS 2, 3.

**SLANDER—**

See LIBEL AND SLANDER.

**SPECIAL LAWS—**

See STATUTES 5.

**STARE DECISIS—**

See COURTS 6.

**STATE HIGHWAY COMMISSION—**

Statute, validity, see CONSTITUTIONAL LAW 17; HIGHWAYS 1, 3, 10.

**STATES—**

1. *Statute.—Validity.—State Question.*—Whether an act of the state legislature is inhibited by the state Constitution is a state and not a federal question. *Felker v. Caldwell*, 364, 367 (4).
2. *Statute.—Interference With Interstate Commerce.—Effect of Federal Decision.*—An appointee of the Governor to the office of state supervisor of oil inspection, under Acts 1901 p. 516, §7890 Burns 1914, was not affected as to his title to such office by a decision of the federal court holding such act invalid as a revenue measure as to interstate shipments of oil. *Felker v. Caldwell*, 364, 368 (5).

**STATUTES—**

See also CONSTITUTIONAL LAW; STATES.

Statutes cited and construed, see p. xxi.

1. *Adoption from Another State.—Construction.—Presumption.*—The legislature, in adopting a statute of another state which had been construed by the courts of that state, also adopted the construction so placed upon it. *Ward v. State*, 606, 609 (4).
2. *Construction.—Purpose.*—Though the rule is that courts should so construe statutes as to meet the mischief sought to be remedied, where the legislative intention is plain, and the enactment as a whole covers the various forms of evils sought to be corrected, the reason for the rule ceases. *Ward v. State*, 606, 611 (5).
3. *Construction.—Ambiguity.*—The rule under which courts may be called upon to construe an ambiguous, uncertain or indefinite statute has no application where the language used is plain and its purpose clear. *Ward v. State*, 606, 608 (2).
4. *Construction.—Prohibition Act.—Prima Facie Evidence of Violation.*—Section 35 of the Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns 1914, declaring that, within ten days after the taking effect of the act, every person except licensed pharmacists, etc., shall remove all intoxicating liquors in his possession from the state, and failure to do so shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, etc., in violation of the act, the section not applying to specifically named quantities kept by a person in the home for domestic use, was intended to aid in the enforcement of §4 by establishing a rule of evidence to sustain a charge of un-

## STATUTES—Continued.

lawfully keeping, etc., and does not make the mere keeping of intoxicants by one not falling within the excepted classes an offense subject to the penalty prescribed by §38.

*Ward v. State*, 606, 609, 611 (3).

5. "*Local or Special Law.*"—*Highways.*—*Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) is in no sense a local or a special law so as to bring it within the inhibition of Art. 4, §22, of the state Constitution.

*Wright v. House*, 247, 259 (16).

6. *Prohibition Act.*—*Title and Subject.*—*Constitutionality.*—The Prohibition Act, Acts 1917 p. 15, is not violative of Art. 4, §19, of the Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

*James v. State*, 579, 582 (3).

7. *Subjects and Titles.*—*Prohibition Act.*—The Prohibition Act, Acts 1917 p. 15, §8356a *et seq.* Burns' Supp. 1918, is not violative of Art. 4, §19, of the Constitution on the ground that the title is not broad enough to cover the penalty provision in §4.

*Dillon v. State*, 603, 604 (1).

8. *Title.*—*Subject.*—*Highways.*—The selection of roads to be improved under the State Highway Act (Acts 1917 p. 253), and the appropriation of money and the levy of taxes to raise funds to pay for such improvements, are properly connected with the subject of the act as expressed in the title "An act creating a highway commission, providing for the construction, reconstruction, maintenance, repair and control of public highways," etc.

*Wright v. House*, 247, 259 (15).

9. *Title.*—*Subject.*—*Constitutional Law.*—Where the general subject of an act is expressed in the title, it is not necessary that matters properly connected therewith shall be also expressed in the title.

*Wright v. House*, 247, 258 (14).

## STAY—

Of proceedings, see APPEAL 4.

## STREAMS—

Pollution, forms of pleading, see ACTION ON THE CASE.

## STREETS—

See MUNICIPAL CORPORATIONS.

## SUBSEQUENT APPEALS—

See APPEAL 46.

## SUPPLEMENTARY PLEADING—

Acts performed after filing complaint, pleading, see PLEADING 12.

## SURETYSHIP—

See PRINCIPAL AND SURETY.

Disabilities of married woman, see HUSBAND AND WIFE.

## SURPLUSAGE—

See INDICTMENT AND INFORMATION 1, 15.



**SURVIVORSHIP—**

Right of action to convert tenancy by entireties, see **HUSBAND AND WIFE** 4.

**SWAMP LANDS—**

Reclamation, boundaries, see **PUBLIC LANDS; WATERS AND WATER-COURSES** 2.

**TAXATION—**

See also **EMINENT DOMAIN; HIGHWAYS** 3.

Legislative power, see **CONSTITUTIONAL LAW** 7.

Mill Tax Act, construction, see **COLLEGES AND UNIVERSITIES**.

Inheritance tax, liability of residuary estate, see **EXECUTORS AND ADMINISTRATORS** 3, 4.

1. *General Taxes.—Amount.*—Since the benefits resulting from organized government cannot be measured in money, taxes levied for governmental purposes are not imposed on the basis of actual benefits resulting to each citizen in proportion to the taxes paid, and the power to tax for such purpose is limited only by governmental needs. *Wright v. House*, 247, 254, (4).
2. *General Tax.—Special Assessments.—Liability.*—A "general tax," under §10344 Burns 1914, Acts 1903 p. 49, creates a personal liability of the taxpayer, and constitutes a general lien on real and personal property of the taxpayer situated in the county; while a "special assessment" creates a particular lien on the property assessed, on the theory that such property has been beneficially affected, and such lien, not being personal, cannot be enforced against any other property.  
*Wright v. House*, 247, 255, 256 (8).
3. *Legislative Power.—Public Improvements.*—The power to determine in what manner the cost of a public improvement shall be raised is legislative in character, and the action of the legislature in that regard is binding on the other departments of government.  
*Wright v. House*, 247, 255 (7).
4. *Levy.—Notice and Hearing.—When Necessary.*—The rule that, where a local public improvement is constructed under a law providing that the cost, or a part thereof, shall be levied on specific property benefited, the owners of such property are entitled to notice and an opportunity to be heard, has no application to the exercise of the general taxing power of the state or of any of its municipal subdivisions.  
*Wright v. House*, 247, 253 (3).
5. *Purpose.—Public Improvements.*—Where the legislature authorizes public improvements that are of such general benefit as to warrant the construction thereof by the state, or by any of its governmental subdivisions, it has power to determine the manner in which the fund shall be raised for the payment of the cost and expenses.  
*Wright v. House*, 247, 254 (5).
6. *Public Improvements.—General Tax.—Special Assessments.—Legislative Power.*—If the legislature decides that a public improvement is of such general benefit as to justify such a course, it may provide that the entire cost shall be raised by a general tax; or, in case it decides that such improvement is not of sufficient public importance to justify the payment of the entire cost by a general tax, it may provide that special assessments shall be made against property beneficially affected and that

**TAXATION—Continued.**

the remainder be paid by the municipality within which the improvement is located from funds raised by general taxation; or, if the total costs do not exceed the aggregate special benefits to the property so affected, the legislature may provide that the entire costs shall be specially assessed against such property. *Wright v. House*, 247, 254 (6).

7. *Special Assessments.*—Though special assessments are a form of taxation, they are not made and collected in the exercise of the general taxing power by which revenue is raised for governmental expenses. *City of Indianapolis v. Bryan*, 586, 590 (5).
8. *Uniform Taxation.—Highways.—Constitutional Law.*—The State Highway Act (Acts 1917 p. 253) does not conflict with Art. 10, §1, of the state Constitution, which provides for a uniform and equal rate of taxation and assessment, although one county, by reason of greater improvements, may pay a larger tax rate than another, since each county is a separate unit for the purpose of taxation.

*Wright v. House*, 247, 258 (13).

**TELEGRAPHS AND TELEPHONES—**

*Reasonableness of Rates.—Admissibility of Evidence.—Appeal from Public Service Commission.*—On appeal to the circuit court from an order of the Public Service Commission fixing telephone rates, it was proper to hear evidence of operating expenses at a time subsequent to the order of the commission, in view of §10052c3 Burns 1914, Acts 1913 p. 167, §81, which authorizes the hearing of different or additional evidence by the court and provides for the transmission thereof to the commission. *Public Service Commission v. Frazee*, 573, 575 (2).

**TENANCY BY ENTIRETIES—**

Insanity, change of tenancy, statute, see HUSBAND AND WIFE 4;  
INSANE PERSONS.

**TESTAMENTARY CAPACITY—**

See WILLS.

**TEXT BOOKS—**

Cited, see p. xxv.

**THEORY—**

Of petitioners, effect on appeal, see DRAINS 5.

Determination from pleadings, see JUDGMENT 1.

**TORTS—**

*Joint Liability.*—A person is not liable as a joint tort-feasor unless he participated in the wrongful act which caused the injury. *Sourbier v. Brown*, 554, 567 (14).

**TOWNS—**

See MUNICIPAL CORPORATIONS.

Elections, tie vote, casting lots, see ELECTIONS

**TOWNSHIPS—**

Maintenance of cemeteries, see CEMETERIES; DEDICATION.

Schools, transfer of pupils, complaint, see MANDAMUS 3.

## TRADING STAMPS—

Statute, validity, see CONSTITUTIONAL LAW 2, 4, 14.

## TRESPASS—

1. *Quare Clausum Fregit*.—*Nature of Action*.—The foundation of the action *quare clausum fregit* is the breaking by the defendant of the plaintiff's close, and the action can be maintained by one in possession having an interest in the profits only. *Indiana Pipe Line Co. v. Christensen*, 400, 407 (5).
2. *Quare Clausum Fregit*.—*Action*.—*Right to Maintain*.—In an action of trespass *quare clausum fregit* it is necessary for the plaintiff to prove only that he was in possession of the land and that the defendant entered thereon without right, such proof entitling the plaintiff to nominal damages, without proof of injury; and upon additional proof of injury to products of the soil, the plaintiff is entitled to compensatory damages. *Indiana Pipe Line Co. v. Christensen*, 400, 407 (6).
3. *Trespass on the Case*.—*Action*.—*Defense*.—A wrongdoer who by a single completed act causes permanent injury to land can be compelled to pay only a single compensation therefor, and such wrongdoer, when sued for the injury to the freehold by one in possession, may set up as a defense that there is a valid outstanding title in another. *Indiana Pipe Line Co. v. Christensen*, 400, 409 (9).
4. *Trespass on the Case*.—*Action*.—*Defense*.—In an action against a wrongdoer for injury to land, where the title to the land is in issue only as indirectly affecting the measure of damages, proof that the plaintiff was in actual possession of the land under a claim of ownership is sufficient to make a *prima facie* case of title; and in the absence of countervailing proof, the *prima facie* showing of title will stand. *Indiana Pipe Line Co. v. Christensen*, 400, 410 (10).

## TRIAL—

See also APPEAL; COURTS; CRIMINAL LAW.

1. *Conduct of Counsel*.—*Reference to Insurance*.—In an action for injuries sustained by the plaintiff in a collision with the defendant's automobile, it was error for the plaintiff's counsel to offer in the presence of the jury to prove that the defendant carried indemnity insurance and that his counsel were employed by the insurance company. *Martin v. Lilly* 139, 144 (7).
2. *Defective Pleading*.—*Cure by Evidence*.—*Instructions*.—Where, in a railway conductor's action for injuries under the federal Employers' Liability Act, the complaint stated only inferentially the essential fact that the plaintiff and the train upon which he worked were engaged in interstate commerce at the time of the injury, the court properly instructed that the plaintiff establish such fact, since under the statute a defective complaint may be cured by the evidence and will be deemed amended to conform to the evidence. *Jackson, Rec., v. Rutledge*, 415, 424 (6).
3. *Drains*.—*Benefits*.—*Evidence*.—*Court's Inspection of Premises*.—Where, in the trial of a remonstrance to a drainage proceeding, the court by agreement of the parties made a personal inspection of the land affected in order "to apply the evidence heard," the judge's viewing of the land was not in the nature of evidence and cannot be considered with other evidence introduced at the trial. *Moore v. Ryan*, 345, 350 (2).

## TRIAL—Continued.

4. *Findings.—Conclusion.*—The statement in the court's findings in a highway proceeding that the "method of construction, the pavement provided for, and the materials to be used as specified in said last report \* \* \* are materially, substantially and radically different from the kind \* \* \* prayed for" in the original petition, is a mere conclusion having no force as a fact. *Whitesell v. Metsker*, 1, 8 (7).
5. *Findings of Fact.—Necessity of Conclusions of Law.*—Where the trial court, in a highway proceeding, stated a conclusion of law that one of the commissioners, challenged because of interest, was disqualified, but found facts showing a necessity for his vote on a question in the proceeding, it should have stated a conclusion that the vote was justified. *Whitesell v. Metsker*, 1, 6, 7 (4).
6. *Questions of Law or Fact.*—In a railway conductor's action for injuries under the federal Employers' Liability Act, an instruction permitting the jury to determine as a question of fact whether certain rules of the railroad company were in effect was error, such question being one of law. *Jackson, Rec., v. Rutledge*, 415, 426 (8).
7. *Verdict.—Validity.*—A verdict is contrary to law when it is contrary to the principles of law as applied to the facts which the jury is called upon to try. *Lawler v. Bear*, 308, 312 (4).
8. *Verdict.—Special Interrogatories.*—Answers to special interrogatories cannot prevail against the general verdict unless they clearly find facts that cannot be reconciled with the general verdict. *Sourbier v. Brown*, 554, 560 (8).
9. *Verdict.—Special Interrogatories.—Presumptions.*—Where an answer to an interrogatory, when considered in connection with the interrogatory to which it is responsive and with other interrogatories and answers relating to the same subject, is not doubtful and uncertain, but is susceptible of a reasonable meaning consistent with the general verdict, it is the duty of the court to uphold the general verdict, since all presumptions are indulged in its favor. *Sourbier v. Brown*, 554, 562 (11).
10. *Given Instructions.—Requests.*—There was no error in refusing requested instructions that were covered in substance by those given. *Citizens' Bank, etc. v. Opperman*, 212, 217, 219 (5).
11. *Instructions.—Province of Jury.—Negligence.*—The use of such terms as "slight care," "great care," or other like expressions in instructions, as indicating the quantum of care that the law exacts under special conditions and circumstances, is misleading, and constitutes an invasion of the province of the jury. *Union Traction Co. v. Berry, Admr.*, 514, 523, 529 (7).
12. *Instructions.—Necessity of Requests.*—In a libel action against two defendants, an instruction that, if either defendant participated in the publication of the libel, to find against such person or persons so participating, was not erroneous for failing to distinguish between primary and secondary publication, where the defendant objecting claimed he was liable only for republication, but tendered no instruction on that theory. *Sourbier v. Brown*, 554, 568 (16).
13. *Instructions.—Construing Together.*—Instructions must be construed together, and if the instructions, when so construed, state the law correctly, and in such manner as not to be misleading, there is no error, though one or more of the instruc-

**TRIAL—Continued.**

tions considered separately might be incomplete or misleading:  
*Lake Erie, etc., R. Co. v. McFarren*, 113, 119 (5).

14. *Instructions.—Cure of Error.*—An instruction that erroneously stated it to be the duty of an automobile driver to keep a "constant lookout" for pedestrians and for other vehicles could not be cured by other instructions stating the correct rule as to the care required. *Martin v. Lilly*, 139, 144 (5).

15. *Instructions.—Construction as a Whole.—Degree of Care.*—Where, in a personal injury case, the instructions as a whole define the care that both the plaintiff and the defendant were required to exercise as that which an ordinarily prudent person would exercise under like circumstances, the giving of an instruction containing the expressions "ordinary prudence" and "the care which a 'prudent person' would exercise under like circumstances" was not reversible error.  
*Mishler v. Chicago, etc., R. Co.*, 189, 195 (6).

16. *Motions.—Venire de Novo.—Arrest of Judgment.*—A motion, though termed a motion in arrest of judgment, will be treated as a motion for a *venire de novo* where it is directed to the verdict alone and the remedy sought is unmistakably that which can only be had by a motion for a *venire de novo*.  
*Phillips v. Gammon*, 497, 499, 500 (2).

**TRUSTS—**

See EXECUTORS AND ADMINISTRATORS 2; WILLS 5.

**UNIVERSITIES—**

See COLLEGES AND UNIVERSITIES.

**USER—**

See CEMETERIES; MUNICIPAL CORPORATIONS 5.

**VALUE—**

Construction of statutory provision, see ARSON 4.

**VARIANCE—**

Charge of larceny, proof of robbery, effect, see RECEIVING STOLEN GOODS.

**VENDOR AND PURCHASER—**

See EXECUTION 3, 4.

**VENIRE DE NOVO—**

See CRIMINAL LAW 63; JUDGMENT 4; TRIAL 16.

**VENUE—**

Change, ruling on motion, review, see CRIMINAL LAW 85, 106.

Change of judge, see JUDGES.

Charging, sufficiency, see INDICTMENT AND INFORMATION 28.

**VERDICT—**

See TRIAL 7-9.

Review, see APPEAL 20, 21-30; CRIMINAL LAW 62-65, 103; DAMAGES 3.

**VIEWERS—**

See HIGHWAYS 6, 8.

**VOIR DIRE—**

Jurors, examination, discretion, see JURY.

**VOTE—**

Casting lots, in case of tie, see ELECTIONS.

**WAGES—**

Assignability, see ASSIGNMENTS 3, 4.

**WAIVER—**

Of error, see APPEAL 44, 45.

Of defects, street improvements, see MUNICIPAL CORPORATIONS 12.

Of objections to pleading, see PLEADING 4.

**WARDS—**

See GUARDIAN AND WARD.

**WARRANTY—**

See CONTRACTS 4.

**WATERS AND WATERCOURSES—**

See also DRAINS.

Pollution of stream, action, see ACTION ON THE CASE.

1. *Boundaries.—Intention of Parties.*—Where it is apparent that the parties to a conveyance to land adjoining nonnavigable waters intended the meander line as a boundary limiting the extent of the grant, the intention of the parties will control.

*Tolleston Club, etc. v. Carson*, 642, 657 (4).

2. *Swamp Lands and Lakes.—Boundaries.—Meander Lines.*—Where a conveyance describes lands bordering on nonnavigable waters such as lakes or swamps of circular or irregular form, the doctrine of riparian ownership, which applies to conveyances of lands bounded by nonnavigable streams, has no application, but the submerged land is treated as surveyed and the lines of the survey of the border lot, unless otherwise indicated, are regarded as protracted across the water so as to include, as *part of the grant* thereof, the title to the submerged land to the limits of the subdivision within the lines so protracted, even though the title of the abutting owner is extended beyond the center of the water or to the opposite shore.

*Tolleston Club, etc. v. Carson*, 642, 653, 654 (2).

**WEAPON—**

Identification, sufficiency, see HOMICIDE 6.

**WIFE—**

See **HUSBAND AND WIFE.**

**WILLS—**

See also **EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.**

1. *Codicil.—Republication.—Contest.—Burden of Proof.*—In an action to have a will and codicil declared invalid, the contestant has the burden of establishing the invalidity of both instruments, since the codicil, if valid, serves to republish the original will except as modified by the codicil.  
*Oilar v. Oilar*, 125, 127 (1).
2. *Contest.—Admission of Evidence.—Harmless Error.*—In an action to contest a will upon the grounds of mental incapacity and undue influence of the testator, the admission under the latter issue of the declaration of a defendant legatee that "the will was made to suit her" was harmless error, where there was sufficient evidence to sustain the jury's finding that the testator was of unsound mind.  
*Oilar v. Oilar*, 125, 129 (4).
3. *Contest.—Admissibility of Evidence.*—In a will contest, statements alleged to have been made by the testator concerning the provision he intended to make for the plaintiff in his will were properly admitted in evidence to show the testator's mental condition under an instruction limiting them to such purpose.  
*Oilar v. Oilar*, 125, 129 (5).
4. *Contest.—Testamentary Capacity.—Evidence.—Conflict.*—In an action by a daughter to contest her father's will, which stated that she had been provided for by prior advancement, evidence tending to show that the testator's health failed following an operation and his memory weakened, that it was difficult for him to turn his mind from one subject of conversation to another or to readily grasp matters explained to him, that the relations between the father and the daughter had been friendly, and that certain land deeded to the daughter had been purchased by the testator with money held by him as her guardian, was sufficient, as against objection raised in the Supreme Court, to warrant the jury in inferring that the testator did not understand the provision made for the plaintiff, though only three witnesses gave opinions that the testator was of unsound mind when the will was executed and the facts upon which the opinions were based rendered them of little, if any, probative force, since the court on appeal will not set aside a verdict that is against the preponderance of the evidence, such duty being that of the trial court upon proper presentation of the question.  
*Oilar v. Oilar*, 125, 127 (2).
5. *Devise to Executors in Trust.—Deed.—Vesting of Estate.*—Where a testatrix by provision in her will made a deed to her foster daughter a part of the will, and placed the deed in the hands of her attorney to be held until her death and then to be delivered to the executors of the will to be held by them until the daughter became twenty-one years old, or destroyed in the event of the daughter's death before she reached such age, in which event the title was to be disposed of under the terms of the will, the will and the deed created a trust in favor of the daughter, but did not convey a present interest, the title vesting in the executors in trust upon the death of the testatrix to go to the daughter by delivery of the deed on her attaining majority.  
*Nation v. Green, Exr.*, 697, 706 (6).

## WITNESSES—

See also APPEAL 31; CRIMINAL LAW 25, 43-45; EVIDENCE.

1. *Accused as Witness.—Cross-Examination.—Credibility.*—  
Though a defendant in a criminal prosecution testifying in his own behalf may be cross-examined as to a prior conviction for the purpose of affecting his credibility as a witness, it was error for the court to instruct the jury that impeaching testimony brought out in such cross-examination should be considered in determining the defendant's guilt or innocence.  
*Pierson v. State*, 239, 243, 245 (1).
2. *Contradictory Statements.—Right to Explain.*—In a statutory rape case, it was not error for the court to permit the prosecuting witness to explain why she wrote a letter to the defendant, which had been introduced by the defense, and which tended to exonerate the defendant and to contradict her testimony, since a witness has the right to explain or reconcile inconsistent statements and to have the explanation submitted to the jury.  
*Koehler v. State*, 387, 390 (3).
3. *Contradictory Evidence.—Reputation of One Accused by Defendant.—Homicide.*—In a prosecution for murder, where the defendant had tried to fix guilt upon another, the state had the right to show that the defendant's story, wherein he accused the other person, was a falsehood, and in so doing could introduce testimony of the reputation for honesty and peacefulness of such person and that he had had no opportunity to commit the crime.  
*Berry v. State*, 102, 110 (3).
4. *Credibility.—Cross-Examination.—Extent.*—Any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be shown in cross-examination, but the extent to which such cross-examination may be carried is within the sound discretion of the court.  
*Pierson v. State*, 239, 245 (2).
5. *Impeachment.—Contradictory Statements.*—Where the jury finds that a witness has made statements out of court at variance with his testimony, the fact may tend to impeach the recollection or truthfulness of the witness, and the jury may consider the point in determining the weight to be given his testimony.  
*Colandro v. State*, 533, 535 (3).

## WORDS AND PHRASES—

"Actionable fraud," definition, see FRAUD 2.

"Bribe," definition, see BRIBERY.

"Furnish," construction, see INTOXICATING LIQUORS 10.

"Unlawful act," meaning, see HOMICIDE 5.

Use of disjunctive "or" in charging offense, effect, see INDICTMENT AND INFORMATION 5, 27.















